BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of: Lifetime Entertainment Services, LLC Petition for Declaratory Ruling to Clarify Scope ofRu1e 64.l200(a)(3) or, in the Alternative, for Retroactive Waiver	Proceeding Number: 02-278

DECLARATION OF TODD C. BANK

1. I am counsel to Mark Leyse, on whose behalf I submit this declaration, which is in support of Mr. Leyse's comment on the Petition by Lifetime Entertainment Services, LLC ("Lifetime"), for a declaratory ruling to clarify the scope of Rule 64.1200(a)(3), or, in the alternative, for a retroactive waiver.

2. Annexed as Exhibit "A" hereto is a true and accurate copy of Lifetime's Statement of Material Facts Not in Dispute in Support of Lifetime's Motion for Summary Judgment in *Leyse v. Lifetime Entertainment Services, LLC*, No. 1:13-cv-05794-AKH (S.D.N.Y. May 15, 2015) (the "*Leyse* Action").

3. Annexed as Exhibit "B" hereto is a true and accurate copy of relevant portions of the transcript of the deposition of Tracy Barrett Powell in the *Leyse* Action, dated January 9, 2015.

4. Annexed as Exhibit "C" hereto is a true and accurate copy of the declaration, dated May 15, 2015, of Tracy Barrett Powell in the *Leyse* Action.

5. Annexed as Exhibit "D" hereto is a true and accurate copy of the declaration of Sara Edwards Hinzman, dated May 15, 2015, in the *Leyse* Action.

6. Annexed as Exhibit "E" hereto is a true and accurate copy of a Time Warner Cable's customer agreement, which was submitted by Lifetime as an exhibit in support of Lifetime's motion

for summary judgment in the *Leyse* Action.

7. Annexed as Exhibit "F" hereto is a true and accurate copy of an exhibit, filed as Exhibit "EE," that was submitted by Lifetime in support of Lifetime's motion for summary judgment in the *Leyse* Action.

8. Annexed as Exhibit "G" hereto is a true and accurate copy of an exhibit, filed as Exhibit "Z," that was submitted by Lifetime in support of Lifetime's motion for summary judgment in the *Leyse* Action.

9. Annexed as Exhibit "H" hereto is a true and accurate copy of an exhibit, filed as Exhibit "AA," that was submitted by Lifetime in support of Lifetime's motion for summary judgment in the *Leyse* Action.

10. Annexed as Exhibit "I" hereto is a true and accurate copy of the order of denial of Lifetime's motion for summary judgment in the *Leyse* Action, dated September 22, 2015.

11. Annexed as Exhibit "J" hereto is a true and accurate copy of a letter from former FCC General Counsel Samuel L. Feder to the Acting Clerk of the Court of Appeals for the Second Circuit ("Feder Letter").

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

s/ *Todd C Bank*
Todd C. Bank
Executed on February 3, 2016

Exhibit "A" to the Declaration of Todd C. Bank

Statement of Material Facts Not in Dispute in Support of the Motion for Summary Judgment by Lifetime Entertainment Services, LLC, in *Leyse v. Lifetime Entertainment Services, LLC*, No. 1:13-cv-05794-AKH (S.D.N.Y. May 15, 2015)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT NEW YORK

MARK LEYSE, individually and on behalf of all others similarly situated, Plaintiff, - against - LIFETIME ENTERTAINMENT SERVICES, LLC, Defendant.	No. 13-cv-5794 (AKH)

DEFENDANT'S STATEMENT OF MATERIAL FACTS NOT IN DISPUTE IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Defendant Lifetime Entertainment Services, LCC ("Defendant" or "Lifetime"), by its attorneys, hereby submits this statement pursuant to Fed. R. Civ. P. 56 and Local Rule 56.1 of the United States District Court for the Southern District of New York, in connection with its Motion for Summary Judgment. The material facts as to which there is no genuine issue to be tried are as follows:

1. On August 16, 2013, Plaintiff Mark Leyse ("Leyse" or "Plaintiff") initiated this litigation, and filed a complaint asserting a claim under the Telephone Consumer Protection Act ("TCPA") on behalf of himself and a putative class of recipients arising from the receipt on or about August 19, 2009 of a pre-recorded telephone message from Lifetime (the "Telephone Message"). [Doc. No. 1].

2. Leyse has been employed in a variety of jobs including as an investigator for lawyer Todd C. Bank, Leyse's counsel in this action, investigating violations of the TCPA. [Ex. A at 27:10-31:7, 32:7-34:11].

3. In 2009, Leyse shared an apartment (the "Apartment") with Genevieve Dutriaux ("Dutriaux") in New York City. Leyse and Dutriaux did not have other roommates. [Ex. A at 42:2-24, 50:7-10].

4. In 2009, the Apartment's lease was in Dutriaux's name, not Leyse's. [Ex. A at 42:21-43:3; Ex. H at Response to Interrogatory 5].

5. In 2009, the telephone service in the Apartment was in Dutriaux's name, not Leyse's. [Ex. A at 41:19-43:09, 45:7-16].

6. In 2009, the telephone number for the telephone in the Apartment was (212) 662-9058. [Ex. A at 43:10-15, 45:7-10].

7. Leyse heard the Telephone Message by retrieving a recording of it from the answering machine or voice mail attached to Dutriaux's telephone number. [Doc. No. 27;Ex. A at 53:14-54:12, 56:3-9].

8. Leyse played the Telephone Message recording for his counsel, who then re-recorded it. [Ex. A at 58:14-58:14].

9. Leyse does not recall when the Telephone Message recording was left on the voice mail or answering machine. [Ex. A at 58:17-20].

10. Leyse does not recall when he first listened to the Telephone Message. [Ex. A at 51:19-56:2].

11. Leyse cannot demonstrate any concrete injury to himself that arose directly from listening to the Telephone Message. [Ex. A at 66:25-69:10].

12. Leyse is not aware of having received any other messages from Lifetime on Dutriaux's telephone number or any other telephone number. [Ex. A at 66:16-24)].

13. Leyse has produced no documents showing that he ever paid the telephone bill for telephone number (212) 662-9058, and stated that he did not possess any such documents. [Ex. I at Responses to Requests 3, 4, and 6].

14. Leyse had a cell phone in 2009, whose number he provided when asked to provide a telephone number for work, and used that number primarily. [Ex. A at 34:16-35:10, 45:7-49:13].

15. Defendant owns and operates the Lifetime® cable television channel. [Declaration of Sara Edwards Hinzman dated May 15, 2015 ("Hinzman Decl.") ¶ 2].

16. Lifetime's programming includes original scripted series, non-scripted reality series, and movies, as well as syndicated programming that originally appeared on network television (such as episodes of "Frasier," "How I Met Your Mother," and "Grey's Anatomy"). [Hinzman Decl. ¶ 2].

17. Lifetime also operates cable television channels LMN® and LRW™. [Hinzman Decl. ¶ 2].

18. A&E Television Networks, LLC officially acquired Lifetime as part of its acquisition of defendant Lifetime Entertainment Services, Inc. as of September 15, 2009. [Hinzman Decl. ¶ 1; *see also* Ex. K].

19. "Project Runway" is a reality television series in which contestants compete against one another by designing and constructing specific articles of clothing in response to challenges. For instance, they might be asked to design an outfit for a celebrity or make a garment from items found at a grocery store. [Hinzman Decl. ¶ 14; Ex. L].

20. Heidi Klum is the host of "Project Runway" and serves as one of the judges, while Tim Gunn ("Gunn") serves as an on-air mentor to the contestants. [Ex. M].

21. "Project Runway" first premiered on the Bravo cable television channel in 2004, where it was a big hit. [Ex. M].

22. For its first five seasons, from 2004 to 2008, "Project Runway" aired on Bravo. [Hinzman Decl. ¶ 14; Declaration of Tracy Barrett Powell dated May 15, 2015 ("Powell Decl.") ¶ 3].

23. In 2009, "Project Runway" moved from Bravo to the Lifetime channel. [Powell Decl. ¶ 3].

24. The premiere episode of the sixth season of "Project Runway" was going to be telecast on the Lifetime channel on August 20, 2009. [Powell Dec. ¶ 3].

25. Reruns of seasons one through five of "Project Runway" continued to air on the Bravo cable network. [Hinzman Decl. ¶ 15; Ex. U].

26. "Project Runway" is, and in 2009 was, *only* available on cable television, and is not aired on broadcast television. [Hinzman Decl. ¶ 14].

27. In 2009, the Lifetime channel, LMN® and LMR™ were distributed to cable subscribers in Manhattan, Brooklyn, Queens, the Bronx, and Staten Island by the cable television operator known as Time Warner Cable. [Hinzman Decl. ¶ 4].

28. In 2009, Time Warner Cable was the predominant cable provider for cable television customers in New York City. [Ex. D at 74:19-75:3; Hinzman Decl. ¶ 4].

29. The Lifetime channel was also available in New York City to customers of other television programming providers, including competing cable (such as RCN and Cablevision) and satellite (such as DirecTV and Dish) providers or through television service provided by a telephone company (such as Verizon's FIOS service, which provided limited service in the five boroughs, having just obtained a television franchise in 2008). [Hinzman Decl. ¶ 4].

30. In 2009, as now, Time Warner Cable in New York City offered subscribers the choice of several differently-priced packages of television channels, with the least expensive being a package that consisted of broadcast channels and a few public, educational, governmental, and shopping channels (currently called "Starter TV"). [Hinzman Decl. ¶ 11; Ex. E at 77:6-78:18; Ex. X].

31. Neither Bravo nor Lifetime was available to subscribers to the least expensive Time Warner Cable package offered in 2009, but both channels were included in all of the other packages offered by Time Warner Cable at that time for one applicable Time Warner Cable monthly subscription fee. [Hinzman Decl. ¶ 12; Ex. E at 77:6-78:18; Ex. X].

32. Lifetime's viewers do not now, and did not in 2009, subscribe directly to Lifetime or AETN, or pay any fees directly to Lifetime or AETN. [Hinzman Decl. ¶ 13; Ex. E at 80:11-82:4].

33. Time Warner Cable subscribers need not buy any goods or services, or incur any additional charge (beyond the monthly subscription fee they are already paying), to watch "Project Runway." All they need to do is tune their televisions to the correct channel at the correct time. [Hinzman Decl. ¶¶ 12, 14].

34. In August 2009, Time Warner Cable of New York City moved Lifetime from its long-held channel position (Channel 12) to a new one (Channel 62) (the "Channel Change"). [Hinzman Decl. ¶ 15; Powell Decl. ¶ 3; Ex. D at 42:16-43:14; Ex. E at 5:8-6:12].

35. The Channel Change affected Time Warner Cable customers in New York City. [Powell Decl. ¶ 7.]

36. Lifetime considered numerous methods to notify its viewers about the Channel Change, including emails to registered users of Lifetime.com who resided in the footprint for

Time Warner Cable of New York City; a "crawl" on Time Warner Cable channel 12 informing viewers that Lifetime had moved to Channel 62; television commercials updating Time Warner Cable viewers of the Channel Change; an "on hold" message that Time Warner Cable viewers would hear while waiting on the telephone for customer service from Time Warner Cable; and a point of purchase display at Time Warner retail locations. [Ex. Z; Ex. BB; Powell Decl. ¶ 5; Hinzman Decl. ¶ 16].

37. Lifetime discussed various "proposed tactics" with Time Warner Cable that Lifetime wanted Time Warner Cable to consider using to inform its viewers about the Channel Change. [Ex. AA. *See also* Hinzman Decl. ¶ 16]. Some of these methods could not be executed. For example, Lifetime learned that it was not technically feasible to run a "crawl" on channel 12 that would have alerted viewers that Lifetime was moving to channel 62 on the Time Warner Cable line-up. [Ex. N].

38. Among the methods selected to inform consumers of the Channel Change was a voice broadcast recorded by Gunn, which was to be delivered as a telephone message to Time Warner Cable households in New York City. [Ex. AA; Ex. CC; Ex. DD].

39. Lifetime wished to reach out to Time Warner Cable subscribers in New York City because those customers were affected by the Channel Change. [Ex. D at 53:2-20, 54:21-55:14); Ex. F at 20:22-21:20].

40. Pursuant to the Residential Services Subscriber Agreement in effect in 2009, Time Warner Cable customers consented to telephone contact regarding Time Warner Cable programs, including telephone calls made using an automatic dialing system or an artificial or recorded voice. [Ex. G].

41. Tracey Barrett Powell ("Powell"), Vice President, Distribution Marketing for Lifetime, reached out to Todd Hatley ("Hatley") at OnCall Interactive, a third-party company, to execute the voice broadcast. [Ex. D at 52:15-18; Powell Decl. ¶ 9].

42. Hatley had previously worked with Powell at a marketing firm from about 2004 to 2008 and she knew that he was familiar with voice broadcasting campaigns because he had conducted them while at the firm. [Powell Decl. ¶ 9; Ex. D at 30:17-32:14)].

43. Time Warner Cable and Lifetime collaborated on strategies to inform Time Warner Cable customers about the Channel Change for Lifetime, some of which were executed by Time Warner Cable and others by Lifetime. [Hinzman Decl. ¶ 16].

44. As part of that collaboration, Lifetime reached out to Barbara Kelly, Senior Vice President/General Manager at Time Warner Cable, who was at that time in charge of Time Warner Cable for the five boroughs, Westchester and Connecticut. [Hinzman Decl. ¶ 16].

45. Kelly provided Lifetime with a list of zip codes for the areas in which Time Warner Cable subscribers lived in New York City. [Ex. D at 63:7-64:11; Ex. EE; Hinzman Decl. ¶ 16].

46. Time Warner Cable knew Lifetime would use the zip codes in conjunction with a campaign to deliver a pre-recorded message to Time Warner Cable customers. [Hinzman Decl. ¶ 17; Ex AA].

47. In approximately July 2009, David Hillman, a Vice-President at Lifetime, asked Gunn to record the Telephone Message. Gunn had expressed concern about the fact that Lifetime was moving channels on the Time Warner Cable line-up in New York City and viewers might not be aware of the Channel Change. [Ex. F at 7:17-10:2].

48. On July 27, 2009, Powell asked Anthony Armenise ("Armenise") to have "one of [his] guys" draft a script that could be recorded in a voice broadcast. [Ex. O; Powell Decl. ¶ 11].

49. At Armenise's direction, Karen Griffenhagen ("Griffenhagen") drafted a number of different scripts for a 20-second telephone message. [Ex. P; Powell Decl. ¶ 11.]

50. Gunn recorded the Telephone Message. [Ex. F at 6:25-7:16; Ex. Q].

51. The Telephone Message used the following script (with the word "tomorrow" replaced by "today" in the calls that were delivered on August 20, 2009):

> Time Warner Cable customers, this is Tim Gunn. Do you know that Lifetime has moved to Channel 62? Tune in to Lifetime on Channel 62 tomorrow at 10 p.m. and see me and Heidi Klum in the exciting Season 6 premiere of "Project Runway." The "Project Runway" season premiere tomorrow at 10 p.m., following "The All-Star Challenge." Be there and make it work – only on Lifetime, now on Channel 62.

[Schneier Decl. ¶ 2].

52. The purpose of the Telephone Message was to inform cable customers that "Project Runway" was about to begin its sixth season on a new cable channel and that Time Warner Cable had moved Lifetime from channel 12 to a new position at channel 62. [Powell Decl. ¶¶ 4-5].

53. The Telephone Message gave consumers no direction about how to contact Time Warner Cable to purchase a subscription (such as a telephone number, email address, or web site address), or access general information about Time Warner Cable's services, or pricing. [Schneier Decl. ¶ 2].

54. On August 3, 2009, Hatley emailed to Powell a Statement of Work. [Ex. R].

55. Powell provided the zip code list obtained from Time Warner Cable to Hatley at OnCall Interactive and directed OnCall to obtain an appropriate list of telephone numbers for

cable households located within the specified zip codes. [Ex. D at 63:7-9; Ex. EE; Powell Decl. ¶¶ 9-10].

56. OnCall Interactive was responsible for obtaining a list of telephone numbers. [Ex. D at 62:2-17, 63:17-64:11, 67:6-68:15; Ex. E at 62:10-62:22].

57. On August 11, 2009, OnCall Interactive informed Lifetime that it had purchased a list of telephone numbers. [Ex. S].

58. Lifetime was never provided with the list of telephone numbers that were called with the Telephone Message. [Ex. D at 61:13-15; Powell Decl. ¶ 10].

59. OnCall Interactive is now defunct. Hatley and Matthew Maday, formerly the CEO of OnCall Interactive, both testified that neither they nor OnCall Interactive (which was still in existence but winding down at the time of Maday's deposition) possessed any documents relevant to this matter, including a copy of the list of telephone numbers that was used in conjunction with the Telephone Message. [Ex. B at 7:13-9:17; 14:18-15:10; 22:20-25; 28:24-30:19;32:14-25; 63:16-65:15; Ex. C at 7:7-9:19, 31:2-23].

60. Lifetime does not, and did not, know the name of the vendor that OnCall Interactive contacted to purchase the list of telephone numbers. [Ex. D at 59:16-60:15].

61. Neither Maday nor Hatley recalls from whom the list of telephone numbers was purchased. [Ex. B at 43:25-45:2; Ex. C at 7:7-8:7, 31:2-23].

62. Lifetime believed that OnCall Interactive and the call vendor complied with all legal requirements in contacting cable customers with the Telephone Message. [Ex. D 108:21-113:21].

63. Other than the complaint at issue in this litigation, Lifetime has received no other complaints about the Telephone Message. [Powell Decl. ¶ 12].

64. As of 2003, according to the Nielsen Company, a research organization that monitors people's television viewing habits, 84% of American television households received all of their television programming – both broadcast channels like NBC and cable channels like Lifetime – by subscribing to a pay service (cable, satellite, or telephone). [Ex. Y]. By 2012, 91% of American television households received all of their television programming via paid television. [Ex. Y].

65. The Federal Communications Commission ("FCC") has recognized that availability and use of television has increased dramatically from 1950 to 2011 . [Ex. W, at 1].

66. Broadcast channels charge cable companies steep retransmission fees, which are the fees that cable companies pay in order to carry the broadcasters' television signals. Those fees are passed along to cable subscribers as part of their monthly subscription fees. [Hinzman Decl. ¶ 7; Ex. E at 75:2-:13]. If a cable company objects to paying a particular broadcaster's retransmission fee, that broadcaster can refuse to allow its signal to be carried, as happened in the 2013 carriage dispute when CBS's programming was "blacked out" for a few weeks on Time Warner Cable in New York City. [Hinzman Decl. ¶ 7].

67. Similarly, cable channels charge carriage fees to distributors (such as cable, satellite, and telephone companies) for the right to carry their signal, which fees are passed along to cable subscribers as part of their monthly subscription fees. [Hinzman Decl. ¶ 8].

68. Broadcast stations and most cable channels also both earn ad sales revenues by selling time slots during their programs to advertisers, who pay for the ability to televise commercial announcements during breaks in the programming. Some cable channels do not interrupt their programming with commercial breaks; these are "premium" cable channels like

HBO and Cinemax, which are optional channels available to cable subscribers for an additional fee. [Hinzman Decl. ¶ 9].

69. Time Warner offers these premium channels now, and did so in 2009. Neither Bravo nor Lifetime is or has ever been a premium cable channel. [Hinzman Decl. ¶ 9; Ex. E at 71:7-9].

70. Prior to 1992, cable companies did not need permission to retransmit broadcast programming, but a law passed in 1992 changed that. Local broadcast stations did not understand right away that this placed them in an advantageous bargaining position, but beginning in about the mid-2000s, they began to realize that they could negotiate for sizable consent fees. Those fees have risen dramatically since 2008. [Hinzman Decl. ¶ 10; Ex. V].

Dated: New York, New York
May 15, 2015

DAVIS WRIGHT TREMAINE LLP

By: /s/ Sharon L. Schneier
Sharon L. Schneier
Edward J. Davis
Camille Calman

1633 Broadway – 27th Floor
New York, New York 10019
Tel: (212) 489-8230
Fax: (212) 489-8340
Email: sharonschneier@dwt.com
Email: eddavis@dwt.com
Email: camillecalman@dwt.com

Attorneys for Defendant Lifetime Entertainment Services, LLC

TO: TODD C. BANK,
ATTORNEY AT LAW, PC
119-40 Union Turnpike
Fourth Floor
Kew Gardens, New York 11415
(718) 520-7125
Counsel to Plaintiff

Exhibit "B" to the Declaration of Todd C. Bank

Portions of the Transcript of the Deposition of Tracy Barrett Powell, dated January 9, 2015, in *Leyse v. Lifetime Entertainment Services, LLC*, No. 1:13-cv-05794-AKH (S.D.N.Y.)

Declaration of Todd C. Bank
Exhibit "B"

Portions of Transcript of Deposition of Tracy Powell
(January 9, 2015)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARK LEYSE, Individually and on Behalf of All Others Similarly Situated,	)	
Plaintiff,	)	
vs.	)	Index No. 1:13-CV-05794-AKH
LIFETIME ENTERTAINMENT SERVICE, LLC,	)	
Defendant.	)	

DEPOSITION OF TRACY POWELL

New York, New York

Friday, January 9, 2015

Reported by:
MICHELLE COX

January 9, 2015

10:37 a.m.

Deposition of TRACY POWELL, held at the offices of Davis Wright Tremaine LLP, 1633 Broadway, New York, New York, pursuant to Notice, before Michelle Cox, a Notary Public of the State of New York.

A P P E A R A N C E S:

TODD C. BANK ATTORNEY AT LAW, P.C.
Attorneys for Plaintiff
119-40 Union Turnpike, 4th Floor
Kew Gardens, New York 11415
BY: TODD C. BANK, ESQ.

DAVIS WRIGHT TREMAINE LLP
Attorneys for Defendant
1633 Broadway, 27th Floor
New York, New York 10019-6708
BY: SHARON L. SCHNEIER, ESQ.

ALSO PRESENT: Heddy Gold, Esq., A&E Networks

question, I'd like to take a break.

MR. BANK: Sure.

A Can we start by just rephrasing the question.

Q Sure.

You mentioned you provided ZIP codes to Mr. Hatley; is that correct?

A Correct.

Q And was it your understanding that everybody who lived in those ZIP codes was a Time Warner Cable customer?

A That's not the way I would have -- that's not the way I would have thought about it. The ZIP codes provided to me was from Time Warner Cable. So that was the service area that they provided.

What I asked from Todd Hatley was a list of cable customers in that -- in those ZIP codes.

Q When you say that you obtained the ZIP codes from Time Warner, how did that occur?

A I did not remember this without being refreshed, but Sarah Hinszman, who is on our team, reached out to Time Warner Cable.

Powell

Q Did Time Warner Cable charge Lifetime for this information?

A No.

Q Did Ms. Hinszman identify why she was asking for it?

A I wasn't party to the conversations.

Q How did Time Warner provide the information; was it in writing or something else?

A I believe it was by e-mail.

Q Again, I'm trying to understand.

A Yeah.

Q Well, let's ask it this way. Let me introduce what's been premarked as Exhibit A, and take a look at that document. It's three pages.

A Okay.

Q Have you ever seen this document before just now?

A This is a document that's familiar, but not one I remember specifically.

Q How is it that you find it to be familiar?

A When I look at it, I remember it.

Q So you've seen it before just now?

Powell

Is it fair to say that that's one of the ZIP codes that we've been discussing?

A It's on the grid.

Q Okay. So is it one of the ZIP codes we've been discussing?

A Yes.

Q And, again, as of 2009, was it your understanding that everybody that lived in that ZIP Code was a Time Warner Cable customer?

A No. I -- what I hear -- no.

What I hear you saying is, that everyone in these ZIP codes were Time Warner customers.

Q That's not what I meant -- I'm saying at all.

MS. SCHNEIER: Please don't cut her off. Let her finish her answer.

Q Go ahead.

A These are ZIP codes where Time Warner Cable had service.

What I asked for, and what it says right above that is "500,000 cable households in these ZIP codes."

Q My question is specific.

In 2009, was it your understanding or

Powell

Q So that's how I heard it.

Was it your understanding that Mr. Hatley was going to get his phone numbers from Time Warner?

A No. I provided the ZIP codes. Time Warner -- let me start again.

Time Warner Cable provided ZIP codes. I gave those to Todd Hatley. Then he worked with his list vendor to identify cable households in that footprint.

Q Was it your understanding that the list vendor obtained the telephone numbers from Time Warner?

MS. SCHNEIER: If she had an understanding.

MR. BANK: I just -- obviously, it's an understanding. You don't have to coach her like that.

MS. SCHNEIER: Well, first of all, I'm not coaching her.

MR. BANK: Okay. It sounded like it.

Go ahead. If you have more to tell the witness, go ahead.

Okay.

A What's the question?

MR. BANK: Could you read back the last question, please.

(Record read.)

A I have no knowledge of where the list vendor gets its list.

Q Did you have an understanding of whether the telephone numbers originated from Time Warner?

In other words, for example, just to clarify my question, perhaps Time Warner gave those numbers or sold those numbers to one particular person who sold it to someone else and so on and so forth, until it finally got to the list vendor and then to Todd Hatley; that's just an example to explain my question.

MS. SCHNEIER: Objection to the form.

Q My question is: Do you know what the ultimate source of the telephone numbers was?

MS. SCHNEIER: Objection.

A No.

Q No?

A No.

Q Did Mr. Hatley ever tell you that the

that way, do you have any other reason to believe your direction was complied with?

MS. SCHNEIER: Objection to the form.

You can answer any way you can.

A Quite honestly, I'm not sure how to answer.

Q Well, did Mr. Hatley ever say anything -- did Mr. Hatley ever explicitly tell you, be it orally or in writing or anything else, that the numbers he was obtaining belonged only to individuals who subscribed to Time Warner Cable?

MS. SCHNEIER: Objection to the form.

I think you keep inserting Time Warner Cable. I think she used the phrase "cable households."

MR. BANK: I'm sorry. Let me go back.

Q When you refer to "cable households," are you specifically referring only to Time Warner Cable households, or would that include households that might have subscribed to other cable services?

A What I asked for was cable households in the Time Warner ZIP codes. Time Warner Cable

is the dominant provider in New York City and in all these ZIP codes.

Q Again, referring to 2009, was Time Warner Cable the only cable provider in those ZIP codes?

A The only cable company, yes.

Q Okay. When you say "the only cable company," what do you mean by the term "cable company"?

A There could be Direct TV or Dish Network. Those are satellite. I didn't ask for satellite; I asked for cable households.

Q Have you ever heard of a company called RCN?

A Yes.

Q Was RCN a provider of cable television services in New York City in 2009?

A I don't know their footprint.

Q So you don't know one way or the other?

A No, I don't know where RCN has their customers.

Q Do you know if RCN --

MS. SCHNEIER: You're asking her if she knows now?

Powell

MR. BANK: No.

Q Well, I'm asking your knowledge now.

I'm asking if you know that, in 2009, whether RCN provided cable services to anybody?

A I'm familiar with RCN.

Q All right. So do you know if in 2009 RCN provided any cable television service to anybody?

A Yes, RCN is a cable company. I just don't know their exact service area.

Q Do you know if any part of New York City was in RCN's cable service area in 2009?

A I don't recall.

Q Do you know if RCN provides cable service in the New York City area today?

A I don't know.

Q Okay. Do you know if RCN has ever provided any cable service in the New York City area?

A I don't know.

Q And other than RCN, do you know of any other cable service providers that provided cable service in the New York City area in 2009?

A No.

Q Okay. Now, earlier you described, a moment ago, you described Time Warner as, I believe, the dominant cable service provider in the New York City area in 2009?

A Mm-hmm.

Q Is that correct?

A Yes.

Q My understanding is -- and please do correct me if I'm wrong -- is that when you say "dominant," that implies to me that there is some other, albeit smaller, cable company or cable companies that also provided service in 2009.

Is that what you meant by the term "dominant"?

A There's satellite companies.

Q Not including satellite.

A So rephrase the question, then.

Q Not including satellite companies, is it your understanding that there was at least one or more other companies besides Time Warner Cable that provided cable services to households in the New York City area in 2009?

Powell

A I don't know all the companies that provided service in that area at that time.

Q Do you know if there were any besides Time Warner?

I'm not asking the names.

I'm asking do you know if there were any other cable providers, not including satellite and not including Time Warner, to New York City in 2009?

A I don't know.

Q Did you ever look into determining whether that was -- I know you don't know now.

A Right.

Q Do you know if in 2009 you knew the answer to that question?

A I don't know.

Q Do you know if -- did you ever look to see if Time Warner was the only cable provider in New York City in 2009?

A I'm sorry. What was the question?

Q Did you ever try to determine if Time Warner Cable were the -- was the only cable provider in 2009 in New York City?

A Not that I recall.

Powell

Q Did you direct anyone else to try to find that out?

A Not that I recall.

Q Was there any particular reason why you didn't -- let me withdraw that.

Were you ever asked to find that out?

A Not that I recall.

Q So is it fair to say that, as far as you knew, in August of 2009 there might have been other cable providers in the New York City area besides Time Warner and there might not have been?

MS. SCHNEIER: Objection to the form of the question.

A It's possible.

Q So is the answer, "yes," as far as you knew, it might have been the case or it might not have been the case?

MS. SCHNEIER: I think she answered the question.

MR. BANK: It's a yes-or-no question.

MS. SCHNEIER: She can answer it any way she wants.

A Then I'd like you to restate the question.

Powell

Q Okay. Do you want it read back or just to restate it?

I can do either.

A Restate it, please.

Q Okay.

Is it accurate to say that, in 2009, as far as you knew, Time Warner Cable might have been the only cable service provider in New York City, and Time Warner Cable might not have been the only cable service provider in New York City?

MS. SCHNEIER: Objection to the form of the question.

A So yes.

Q Okay.

A May or may not have been.

Q In 2009, did you live in the New York City area?

A No.

Q Have you ever lived in the New York City area?

A I live in the New York City area now.

Q And when did you move to the New York City area?

A 2012.
Q And now are you aware of whether there are any cable service providers in New York City besides Time Warner?
A I don't live in New York City, but there is Verizon. Verizon is here in New York City.
Q And Verizon provides cable service in New York City?
A They are a teleco company that provides programming service.
Q Define "programming service."
A A bundle of networks.
Q And do they call it "cable" or something else?
A They -- I don't want to speak to exactly what they call their service.
Q What do you call their service?
A Television service.
Q Okay. And is Lifetime one of the channels that Verizon provides?
A Yes.
Q Do you know how long Verizon has provided television service, as you say, that included the Lifetime channel?

A No.

Q Do you know if it was -- do you know if Verizon provided that service at any point in 2009 in New York City?

A I don't recall.

Q So as far as you believe, is it fair to say that Verizon might have provided that service in 2009 and might not have?

MS. SCHNEIER: Objection to the form of the question.

A Please restate the question.

Q Sure.

Is it your understanding that as of 2009, Verizon might have provided Lifetime television service and that it might not have provided that service?

MS. SCHNEIER: If you have an understanding of that.

A I don't remember when Verizon started its service. It may or may not have.

Q So is it fair to say that the answer would be "yes" to the question?

A Yes.

Q Okay. Did you ever ask Mr. Hatley who his

list vendor was?
A I don't recall.
Q Do you recall ever being told that you were not entitled to that information?
A I don't recall.
Q Do you recall ever being told that that information was confidential in some respect?
A I don't recall.
Q Do you know if Mr. Hatley ever saw the list of telephone numbers that he obtained from the list vendor?
A I don't know what he saw.
Q Do you know if the list vendor saw the phone numbers on the list that he provided to Mr. Hatley?
A I don't know.
Q And I'm not sure if you said earlier, but do you know where the list vendor obtained the phone numbers from?
MS. SCHNEIER: Objection to the form.
A No.
Q Was it your belief that the numbers originated from Time Warner --
MS. SCHNEIER: Objection to the form --

Powell

Q What would you do if you were instructed to obtain that information, what's the first thing you would do?

MS. SCHNEIER: No. If she knows how to obtain the list.

MR. BANK: Yeah, okay.

MS. SCHNEIER: I think that was the original question.

MR. BANK: That's fine.

MS. SCHNEIER: Would you know how to obtain such a list?

A Can you -- I'm sorry. Please restate the question.

Q Sure.

If you wanted to obtain a list of telephone numbers belonging to New York City Time Warner Cable customers, do you know what you would do to obtain the list?

A I would do the same thing I did in 2009. I would determine the footprint area and find a vendor that supplied lists.

Q Did you ever communicate with anyone from Time Warner about the -- except for the ZIP codes that we discussed earlier, did you ever

the present.

Have you or anyone at Lifetime or A&E ever tried to determine who the list vendor was?

A No, not that I know of.

Q Before the voice broadcast campaign was carried out, were any of your superiors at Lifetime or A&E aware that the campaign was going to be carried out?

MS. SCHNEIER: Objection to the form.

You're focused on her superiors, whether they knew?

MR. BANK: Yes.

A I guess I can't speak specifically to what people knew or didn't know.

But, generally, we wanted to make sure that Time Warner Cable customers knew that the channel had changed. So there was -- it was not -- it was known to people that we were doing what we could to make sure that we publicized that news to customers.

Q Was the voice broadcast campaign specifically known by these people?

MS. SCHNEIER: Objection to the form of the question.

Powell

MR. BANK: I got that.

MS. SCHNEIER: Okay. So I'm not sure what this -- where this is beyond that.

MR. BANK: Can you read back the last question, please.

(Record read.)

Q So I'm not asking you if you know what it actually said. I'm asking if you know whether the Telephone Consumer Protection Act said something about prerecorded phone calls, whatever that something might be?

MS. SCHNEIER: Objection to the form.

A I'm trying to answer the question. I don't know what the act says. I'm not familiar with the act. I don't know what it lays out.

What I did say is that I know that there were -- there are parameters. There's a do-not-call list, something along those lines. That's the extent of it.

Q Did you know that there were any laws that addressed prerecorded phone calls, regardless of whether they were made to people whose numbers were on a do-not-call list in 2009?

A All I know is that there was a do-not-call

list, and that you needed to take that into consideration if you were doing a voice broadcast.

Q How did you come to that knowledge?

A I don't know specifically how I came to that knowledge.

Q Do you recall if you read it?

I'm sorry. Go ahead.

A But I do know, as I mentioned earlier, that a K2 Marketing voice broadcast came up. And I just know from my experience there that there was a do-not-call list, so that lists needed to be make sure they were in accordance with the rules.

But I don't know exactly what the act says. I just know that that is the case.

Q Was anything done with respect to the voice broadcast campaign that we're talking about today, in order to see that the do-not-call rules were complied with?

A I don't recall specific conversations. But given that I know Todd Hatley, and I have worked with him before, and I was familiar with the fact that there were rules against this,

Powell

that -- my assumption was that the list that we were using for this voice broadcast was in accordance with the rules.

Q Did he ever -- did the discussion of the rules ever come up between and you Mr. Hatley?

A I don't remember the specific conversations.

Q Did anyone else at either Lifetime or A&E ask you to look into that issue?

A Not that I recall.

Q So is it fair to say that it was your belief that the list -- that the numbers that -- I'm sorry. Let me withdraw that.

Is it your understanding that the numbers that the list vendor provided to Mr. Hatley did not include numbers on a do-not-call list?

A Say it one more time.

Q Sure.

MR. BANK: Can you read that back, please.

(Record read.)

MS. SCHNEIER: Objection to the form of the question. I think we've gone through this before, that there's been no foundation that the list vendor provided Mr. Hatley with the

a list that was, in any way, problematic.
Q Do you know if Mr. Hatley did anything to see that do-not-call numbers were not part of that list?
A I don't know.
Q Do you know if he did anything to see that telephone numbers on a do-not-call list were not called?
A I don't know.
Q Do you know if the list vendor made any effort to see that do-not-call telephone numbers were not called?
A I don't know.
Q Did you make any effort to see that do-not-call telephone numbers were not called, other than dealing with someone you trusted?
MS. SCHNEIER: Objection to the form of the question.
A I did not do anything other than work with a vendor that I trusted.
Q Did anyone else from Lifetime work with Mr. Hatley on this project?
A I don't recall if anyone else worked with him directly.

vendor, Oncall Interactive, and they're working with a vendor, that that is a proved and legal list to be able to contact. And that that's my trust in the business relationship.

Q Regarding the vendor -- excuse me -- that Mr. Hatley used, do you know if he had ever used that vendor before he used that vendor in connection with this campaign?

A I don't know of the vendor.

Q I understand you don't know the name of the vendor, but do you know if Mr. Hatley had ever used that vendor before he used it in connection with this campaign?

A I don't know.

Q Do you know if he has used that vendor apart from this campaign at any time?

A I don't know.

Q Referring back to Exhibit A, and the last page of that exhibit specifically, do you know if someone from either Lifetime or A&E ever signed another copy or an original of this document?

A I don't remember.

Q Was one of your job duties to sign

don't know why they are different from the total column.

Q For each number that was on the list of phone numbers to be called, how many times was Oncall supposed to call each number?

A One time.

Q So is it correct, then, that if a person were called on August 19th -- I'm sorry. Let me withdraw that.

Is it correct that if a telephone number were called on August 19th, that it would not have been called on August 20th and vice versa?

A That was the intent and the plan of the campaign, they would receive one call.

Q Do you know if that intent was actually carried out?

A I can't say for sure.

Q Do you know who would know that?

A No, I don't know exactly what phone numbers.

But the plan was, is that -- and the reason is, because there were -- you can only broadcast so many calls in a day; so that there were two separate days to be able to reach the

households that we wanted to reach.

Q When you say that there were only so many calls that could be broadcast in a day, why was that?

A That's what I was told, that there was a capacity.

Q Like a logistics capacity?

A Yes.

Q If the call resulted in a busy signal, do you know if Oncall was supposed to try that number at least one more time?

A I don't know.

Q Prior to just a few moments ago, had you ever seen what looks like a spreadsheet that appears on Page 219?

A I don't.

Q I'm sorry. Go ahead.

A Can you repeat the question?

Q Sure.

MR. BANK: Can you read it back.

(Record read.)

MS. SCHNEIER: Objection to the form.

A I don't specifically recall seeing this, but it was an e-mail to me on August 24th.

Powell

MS. SCHNEIER: Because you seem to believe that if it was asked and answered, it's appropriate to instruct the witness not to answer; is that correct?

MR. BANK: Mark Leyse has no relevance to how you should --

MS. SCHNEIER: You know what, first of all, I'm going to object.

MR. BANK: Let me finish.

MS. SCHNEIER: Sure.

MR. BANK: My beliefs have no bearing on whether your instruction to the witness is proper or not. It has no relevance whatsoever.

MS. SCHNEIER: Can I have that question read back, please?

(Record read.)

MS. SCHNEIER: If you can answer the question.

A I think this is what I said before, that I worked with an agency that was handling this portion of the -- that was handling this.

And I entrusted that this was all being done legally.

Q Is Mr. Hatley an attorney?

A Not to my knowledge.
Q Do you know if he ever consulted with legal counsel prior to the voice broadcast campaign in relation to that campaign?
A I don't know.
Q Do you know the names of any of the other Oncall employees at the time that this campaign was carried out?
A I'm sorry. Repeat the question?
Q Sure.
MR. BANK: Actually, can you read it back.
(Record read.)
A The only other name I know from Oncall is Matt Maday.
Q Did you ever communicate with him?
A I don't think so, no.
Q Do you know if Mr. Maday is an attorney?
A I don't know.
Q Do you know if he ever consulted with an attorney relating to the voice broadcast campaign?
A No, I don't.
Q Do you know if any of OnCall's employees, at the time the campaign was carried out were

attorneys?
A I don't know.
Q Do you know if anyone from Oncall consulted with any attorneys in relation to the campaign?
A No, I don't.
Q Is it fair to say that you relied on someone you did not believe to be a lawyer to make sure the campaign was carried out legally?
MS. SCHNEIER: Objection to the form of the question.
A It is true that Todd was not an attorney; and, yes, I relied on him to execute a campaign.
MS. SCHNEIER: Who relied on another company as well.
THE WITNESS: Right.
MR. BANK: Thank you.
Are you testifying or is the witness testifying?
MS. SCHNEIER: Do you have a question, Todd?
MR. BANK: That was my question.
MS. SCHNEIER: I have no answer to your

question.

I'll move to strike the supplemental answer by counsel.

Q Now, earlier you testified that Mr. Hatley dealt with a list vendor; is that correct?

A Yes.

Q And do you know if that list vendor was a person, a corporation or something else?

A I don't know. I don't have any specifics on the list vendor.

Q But even if it were a corporation, obviously, it would have to be a human being that has dealt with -- it's a corporation's name, the legal entity.

That being the preface of course to my next question, which is: Do you know if the list vendor or any employee of the list vendor was an attorney?

A I don't know.

Q Do you know if the list vendor or any employee of the list vendor consulted with an attorney regarding the voice broadcast campaign?

A No, I don't.

background.

Q Do you know if Mr. Hatley or Oncall had ever worked on a voice broadcast campaign other than the one we're discussing today?

A I don't know.

Q Do you know if the list vendor or an employee of the list vendor had ever worked on another voice broadcast campaign?

A I don't know.

Q Have you ever searched for documents relating to this lawsuit?

A Yes.

Q And when did you first do that?

A When I got a call from the attorney, the internal attorney. I don't remember the exact timing of it.

Q Roughly when did that occur?

A I think I stated earlier that I thought it was roughly a year or so ago that I found out about this.

Q And was that the only time you did a search or did you do another search?

A I've been asked more than once.

Q When is the last time you were asked?

C E R T I F I C A T E

STATE OF NEW YORK)

:ss

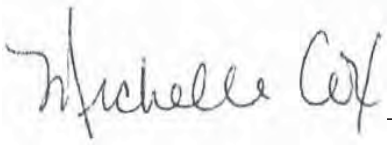
COUNTY OF NEW YORK)

I, MICHELLE COX, a Notary Public within and for the State of New York, do hereby certify:

That TRACY POWELL, the witness whose deposition is hereinbefore set forth, was duly sworn by me and that such deposition is a true record of the testimony given by the witness.

I further certify that I am not related to any of the parties to this action by blood or marriage, and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 27th day of January 2015.



MICHELLE COX, CLR

Exhibit "C" to the Declaration of Todd C. Bank

Declaration, Dated May 15, 2015, of Tracy Barrett Powell in *Leyse v. Lifetime Entertainment Services, LLC*, No. 1:13-cv-05794-AKH (S.D.N.Y.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT NEW YORK

MARK LEYSE, individually and on behalf of all others similarly situated, Plaintiff, - against - LIFETIME ENTERTAINMENT SERVICES, LLC, Defendant.	No. 13-cv-5794 (AKH)

DECLARATION OF TRACY BARRETT POWELL

Pursuant to 28 U.S.C. § 1746, I, TRACY BARRETT POWELL, declare and state as follows:

1. I am Vice President, Distribution Marketing at A&E Television Networks, LLC ("AETN"). AETN is a global entertainment media company with ten distinctive cable television channels including Lifetime®. AETN officially acquired Lifetime® as of September 15, 2009 as part of its acquisition of defendant Lifetime Entertainment Services, LLC ("Lifetime" or "Defendant"). I submit this declaration in support of Defendant's motion for summary judgment. This declaration is based on personal knowledge and/or information supplied by persons employed by AETN.

2. I held the position of Vice President, Distribution Marketing for Lifetime at all times relevant to the events at issue in this lawsuit. My responsibilities at that time included, among others, creating and executing partnerships with Lifetime's cable distributors in order to publicize Lifetime's programming.

3. On August 20, 2009, Season 6 of "Project Runway" began airing on the Lifetime channel after having been telecast on the Bravo channel for its five previous seasons. [*See* Ex. AA].[1] At approximately the same time, on August 19, 2009, Time Warner Cable moved Lifetime from Lifetime's long-held position at Channel 12 to Channel 62 on the Time Warner Cable channel line-up (the "Channel Change"). [*See* Ex. AA]. The Channel Change impacted Time Warner Cable customers in New York City.

4. In approximately July 2009, in anticipation of the impending Channel Change and the scheduled Season 6 premiere of "Project Runway," Lifetime employees from various departments (including distribution, marketing, and publicity) began thinking about various ways to notify Time Warner Cable customers about the show's move from Bravo to Lifetime and the planned Channel Change. [*See* Ex. AA]. The ideas we batted around were aimed towards apprising customers of the Channel Change; they were not designed or meant to market Lifetime.

5. Lifetime considered numerous methods to inform its viewers about the Channel Change, including emails to registered users of Lifetime.com who were in the New York City footprint for Time Warner Cable; a "crawl" on Time Warner Cable Channel 12 updating viewers that Lifetime had moved to Channel 62; television commercials informing Time Warner Cable viewers of the Channel Change; an "on hold" message that Time Warner Cable viewers would hear while waiting on the telephone for customer service from Time Warner Cable; and a point of purchase display at Time Warner retail locations. [Ex. Z; Ex. BB].

6. Among the methods ultimately decided upon to notify Time Warner Cable customers in New York City of the Channel Change was a voice broadcast recorded by Tim

[1] Citations in the form of "Ex. __" refer to exhibits to the Declaration of Sharon L. Schneier, dated May 15, 2015.

Gunn, a celebrity mentor who appears on "Project Runway," which was to be delivered as a telephone message. [Ex. AA; Ex. CC; Ex. DD].

7. Lifetime wished to reach out to Time Warner Cable customers in New York City because those customers were affected by the Channel Change.

8. Time Warner Cable provided Lifetime with a list of zip codes which reflected the areas within New York City in which Time Warner Cable provided service, so that an appropriate list of telephone numbers for cable households in those zip codes could be secured. [*See* Ex. EE].

9. I arranged with Todd Hatley ("Hatley") of OnCall Interactive to facilitate the delivery of the telephone message at issue in this litigation. I had previously worked with Hatley for four years (from 2004 to 2008) at a marketing firm and knew that he was familiar with voice broadcasting campaigns.

10. I forwarded to Hatley the list of New York City zip codes furnished by Time Warner Cable and directed him to obtain telephone numbers for cable households in those zip codes. Lifetime did not receive a copy of the list of telephone numbers to which OnCall Interactive (or an entity on behalf of OnCall Interactive) placed calls. It is my understanding that the calls were placed in accordance with the requirements of the "Do Not Call" registry and all applicable laws.

11. The script for the 20 second call was created in-house by Lifetime employees in accordance with directions I provided. [Ex. P].

12. Other than the complaint in this case, Lifetime did not receive any complaints about the Channel Change telephone message at issue in this litigation.

I, declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this 15 day of May, 2015 in New York, New York.

TRACY BARRETT POWELL

Exhibit "D" to the Declaration of Todd C. Bank

Declaration, Dated May 15, 2015, of Sara Edwards Hinzman in *Leyse v. Lifetime Entertainment Services, LLC*, No. 1:13-cv-05794-AKH (S.D.N.Y.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT NEW YORK

MARK LEYSE, individually and on behalf of all others similarly situated, Plaintiff, - against - LIFETIME ENTERTAINMENT SERVICES, LLC, Defendant.	No. 13-cv-5794 (AKH)

DECLARATION OF SARA EDWARDS HINZMAN

Pursuant to 28 U.S.C. § 1746, I, SARA EDWARDS HINZMAN, declare and state as follows:

1. I am Vice President, Distribution at A&E Television Networks, LLC ("AETN"). AETN is a global entertainment media company with ten distinctive television channels including Lifetime®. AETN officially acquired Lifetime® as of September 15, 2009 as part of its acquisition of defendant Lifetime Entertainment Services, Inc. ("Lifetime" or "Defendant"). I submit this declaration in support of Defendant's motion for summary judgment. This declaration is based on facts within my personal knowledge and/or information supplied by persons employed by AETN.

2. Defendant owns and operates the Lifetime cable television channel. Its programming includes original scripted series, non-scripted reality series, and movies, as well as syndicated programming that originally appeared on network television (such as episodes of "Frasier," "How I Met Your Mother," and "Grey's Anatomy"). Lifetime also operates two other cable channels, LMN® and LRW™.

3. In July and August 2009, I held a similar position for Lifetime as I do now. As part of my duties and responsibilities in 2009, I was responsible for the distribution and promotion of the Lifetime channel with, among others, various programming distributors, including cable providers such as Time Warner Cable.

4. Lifetime, LMN, and LRW were distributed in Manhattan, Brooklyn, Queens, Bronx and Staten Island by Time Warner Cable in 2009. The Lifetime channel was also available in 2009 in New York City to customers of other competing television programming providers, including cable (such as RCN and Cablevision), satellite (such as DirecTV and Dish), or through television service provided by a telephone company (such as Verizon's FIOS service). Time Warner Cable competed with these distributors at the time, but Time Warner Cable's penetration throughout the city was far deeper than theirs. (For example, Verizon's FIOS service only provided limited service in the five boroughs having obtained a television franchise for the first time in 2008.) In 2009, Time Warner Cable was the predominant provider of subscription television service in New York City.

5. While many Americans grew up with free access to television programming over the broadcast airwaves, the television viewing landscape has changed dramatically over the past 20 years. The vast majority of Americans receive their television programming nowadays by subscribing to, and paying, either a cable or telephone company or satellite provider. The content they receive through such subscriptions includes both cable-only channels, such as Bravo and Lifetime, and broadcast channels such as ABC, CBS, NBC, and FOX. The Nielsen Company, a research organization that monitors people's television viewing habits, reports that in 2003, only 16% of American television households accessed their television programming over the airwaves, while 84% paid for their television programming. By 2012, only 9% of

American television households received their television programming over the airwaves; the remaining 91% subscribed to paid television. [*See* Ex. Y].[1]

6. Because at least 91% of all television households now pay a monthly subscription fee to access television (broadcast and cable channels), it is no longer true that broadcast television is free to all, while cable television costs money. Instead, most viewers pay for both broadcast and cable television.

7. Local broadcast stations (or the networks that own them in the case of those local stations that are owned and operated by one of the networks) charge cable operators retransmission fees. These are the fees that cable companies pay for the right to carry the broadcast channels' television signals. These fees are passed on to cable customers as part of their monthly subscription fees. If a cable operator objects to paying a particular broadcaster's retransmission fee, that broadcaster can refuse to allow its signal to be carried, as happened in their carriage dispute of 2013 when CBS's programming was "blacked out" for a few weeks on Time Warner Cable in New York City.

8. Cable channels like Lifetime similarly charge carriage fees to cable providers for the right to carry their signal, which fees are also passed along to cable subscribers as part of their monthly subscription fees.

9. Broadcast stations and most cable channels also both earn ad sales revenues by selling time slots during their programs to advertisers, who pay for the ability to televise commercial announcements during breaks in the programming. (The exceptions are premium, pay-cable channels that charge separate subscription fees, such as HBO and Cinemax. Time Warner Cable offered premium channels in 2009 and does so today.)

---

[1] Citations in the form of "Ex. __" refer to exhibits to the Declaration of Sharon L. Schneier, dated May 15, 2015.

10. While broadcasters and cable operators now have similar business models (relying on advertising sales and retransmission/carriage fees in exchange for content), this has not always been true. The federal law that requires cable and satellite companies to obtain permission to retransmit broadcast content was passed in 1992. Local broadcasting stations did not begin demanding retransmission consent fees from cable system operators until the mid-2000s, and the fees have risen dramatically since 2008.

11. In 2009, as now, Time Warner Cable in New York City offered its subscribers the choice of several differently-priced packages of television channels, with the least expensive being a package that consisted of broadcast channels and a few public, educational, governmental, and shopping channels (currently called "Starter TV"). [Ex. W].

12. Neither Bravo nor Lifetime was available to subscribers of the least expensive Time Warner Cable package in 2009, but both were available in all of the other packages offered by Time Warner Cable at that time for no additional fee above the applicable monthly subscription price. [Ex. X]. In other words, subscribers (in 2009 and today) paid one monthly fee for which they got access to a package that included Lifetime, Bravo and dozens of other channels.

13. Lifetime's viewers do not now, and did not in 2009, subscribe directly to Lifetime or AETN, or pay any fees directly to Lifetime or AETN.

14. "Project Runway," a reality show featuring a clothing design competition, has aired on the Lifetime channel since August 20, 2009. It is only available on Lifetime and is not aired on broadcast television. Prior to August 2009, it appeared on Bravo, another cable (not broadcast) channel. When "Project Runway" moved to the Lifetime channel in 2009, the channel packages of cable subscribers who received Lifetime, would also have included Bravo,

and these subscribers would not have had to make any additional purchase or pay an increased subscription fee in order to watch "Project Runway" after the switch.

15. In August 2009, Lifetime was moving from its long-held Channel 12 position to a new channel – Channel 62– on the Time Warner Cable line-up. The channel change only affected Time Warner Cable customers in the New York City area. The channel change coincided with the Sixth Season premiere of "Project Runway." Lifetime was concerned that viewers who had watched the show for five previous seasons on Bravo would not know that the show was now on Channel 62 on Lifetime, particularly since Bravo was continuing to run Seasons One through Five of "Project Runway" on its own cable channel.

16. Time Warner Cable and Lifetime collaborated on strategies to inform Time Warner Cable customers about the channel change for Lifetime. Some of those strategies were executed by Time Warner Cable and others by Lifetime. As part of that collaboration, Lifetime reached out to Barbara Kelly ("Kelly"), Senior Vice President/General Manager at Time Warner Cable, who was at that time in charge of Time Warner Cable for the five boroughs, Westchester and Connecticut. Kelly provided Lifetime with all of the zip codes for the areas in which their subscribers lived in New York City. [Ex. EE.]

17. Time Warner Cable knew Lifetime would use the zip codes in conjunction with a campaign to deliver a pre-recorded telephone message to Time Warner Cable customers. [*See* Exs. Z & AA.]

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this 15 day of May, 2015, in New York, New York.

SARA EDWARDS HINZMAN

Exhibit "E" to the Declaration of Todd C. Bank

Time Warner Cable's Customer Agreement, Which Was Submitted as an Exhibit in Support of the Motion for Summary Judgment by Lifetime Entertainment Services, LLC, in *Leyse v. Lifetime Entertainment Services, LLC*, No. 1:13-cv-05794-AKH (S.D.N.Y. May 15, 2015)

Schneier Declaration
Exhibit G

TIME WARNER CABLE
RESIDENTIAL SERVICES SUBSCRIBER AGREEMENT

IMPORTANT INFORMATION ABOUT YOUR TIME WARNER CABLE SERVICES

The account holder(s) referred to on the accompanying Time Warner Cable Work Order or statement ("I," "me" or "my") agrees that the Work Order, this Agreement, the Terms of Use referred to below, and any applicable Tariff(s) on file with the state utility commission or comparable state agency in the jurisdiction in which I live, set forth the terms and conditions that govern my receipt of Services from Time Warner Cable, which may include, among others, video, high-speed data and voice Services. The term "Services" and all other capitalized terms used in this Agreement are defined in Section 15.

In consideration of TWC's provision of the Services that I have requested, subject to applicable law, I AGREE AS FOLLOWS:

1. Important Information About This Agreement

(a) This Agreement, the Work Order, the Terms of Use and any effective and applicable Tariff(s), each of which TWC may amend as set forth below, constitute the entire agreement between TWC and me. This Agreement supersedes all previous written or oral agreements between TWC and me. I am not entitled to rely on any oral or written statements by TWC's representatives relating to the subjects covered by these documents, whether made prior to the date of my Work Order or thereafter, and TWC will have no liability to me except in respect of its obligations as described in this Agreement and the other documents referred to above. The use of my Services by any person other than me is also subject to the terms of this Agreement, the Terms of Use, and any applicable Tariff(s).

(b) TWC has the right to add to, modify, or delete any term of this Agreement, the Terms of Use, the Subscriber Privacy Notice or any applicable Tariff(s) at any time. An online version of this Agreement, the Terms of Use, the Subscriber Privacy Notice and any applicable Tariff(s), as so changed from time to time, will be accessible at http://help.twcable.com/html/policies.html or another online location designated by TWC, or can be obtained by calling my local TWC office. The online versions of these documents are always the most current versions.

(c) TWC will notify me of any significant change(s) in this Agreement, the Terms of Use, the Subscriber Privacy Notice or any applicable Tariff(s). Any changes will become effective at such time as we update the on-line version of the relevant document, except where applicable law requires a notice period, in which case the change will become effective at the end of the requisite notice period. Upon effectiveness of any change to any of these documents, my continued use of the Services will constitute my consent to such change and my agreement to be bound by the terms of the document as so changed. If I do not agree to any such change, I will immediately stop using the Services and notify TWC that I am terminating my Services account.

(d) My acceptance of Services constitutes my acceptance of the terms and conditions contained in this Agreement. In the event that a portion of my Services is terminated, or any aspect of it is changed, any remaining service or replacement service will continue to be governed by this Agreement.

2. Payment; Charges

(a) I agree to pay TWC for (i) all use of my Services (including, if TWC is the party billing me for ISP or OLP Service, for my subscription to my choice of ISP or OLP, as applicable), (ii) installation and applicable service charges, (iii) TWC Equipment, and (iv) all applicable local, state and federal fees and taxes. Charges for the Services that I receive have been provided o me. Other charges are set forth on a separate price list that I have received and/or can be provided on request. I will be billed monthly in advance for recurring monthly charges. Other charges will be billed in the next practicable monthly billing cycle following use, or as otherwise specified in the price list. TWC may change both the fees and the types of charges (e.g., periodic, time-based, use-based) for my Services. If I participate in a promotional offer that requires a minimum time commitment and I terminate early, I agree that I am responsible for any early termination fees that were described to me at the commencement of such promotion.

(b) Charges for installation Services and related equipment available from TWC for a standard Services installation may be described in TWC's list of charges and any applicable Tariff(s) and/or can be provided on request. Non-standard installations, if available, may result in additional charges as described in TWC's list of charges. In addition, I agree to pay charges for repair service calls resulting from my misuse of TWC Equipment or for failures in equipment not supplied by TWC.

(c) If my Services account is past due and TWC sends a collector to my premises, a field collection fee may be charged. The current field collection fee is on the price list or can be provided on request. I will also be responsible for all other expenses (including reasonable attorneys' fees and costs) incurred by TWC in collecting any amounts due under this Agreement and not paid by me.

(d) All charges are payable on the due date specified, or as otherwise indicated, on my bill. I agree that late charges may be assessed if my account is past due. My failure to deliver payment by the due date is a breach of this Agreement. The current late fees are on the price list or can be provided upon request and, if applicable, will not exceed the maximum late fees as set forth by applicable law. TWC reserves the right to change the late fees.

(e) I agree that if my Services account with TWC is past due, TWC may terminate any of my Services or accounts, including Digital Phone Service, in accordance with applicable law. If I have a credit due to me or a deposit is being held on any account with TWC, I agree that the credit or deposit may be used to offset amounts past due on any other account I may have with TWC without notice to me. To reconnect any terminated Services, I may be required, in addition to payment of all outstanding balances on all accounts with TWC, to pay reconnect charges or other charges (where applicable) and/or security deposits before reconnection.

(f) TWC may verify my credit standing with credit reporting agencies and require a deposit based on my credit standing or other applicable criteria. TWC may require a security deposit, or a bank or credit card or account debit authorization from me as a condition of providing or continuing to provide Services. If TWC requires a security deposit, the obligations of TWC regarding such security deposit will be governed by the terms of the deposit receipt provided by TWC to me at the time the deposit is collected. I agree that TWC may deduct amounts from my security deposit, bill any bank or credit card submitted by me, or utilize any other means of payment available to TWC, for any past due amounts payable by me to TWC, including in respect of damaged or unreturned Equipment.

(g) If I have elected to be billed by credit card, debit card or ACH transfer, I agree that I will automatically be billed each month for any amounts due under this Agreement. If I make payment by check, I authorize TWC and its agents to collect this item electronically.

(h) TWC may charge fees for all returned checks and account debit, bank card or charge card chargebacks. The current return/chargeback fees are listed in the list of charges on the price list or can be provided on request. TWC reserves the right to change return/chargeback fees.

(i) If I subscribe to HSD Service, I acknowledge that, even if TWC is billing for the HSD Service, my ISP or OLP may require a bank or credit card or account debit authorization or other assurance of payment from me, including for charges for additional or continuing Services outside the HSD Service billed by TWC that are payable under the ISP Terms. I agree that TWC or ISP (and, if applicable, OLP) may bill any bank or credit card submitted by me to ISP or OLP, or utilize any other means of payment available to ISP or OLP for any past due amounts payable by me to TWC. I also agree that responsibility for billing for my HSD Service subscription may be changed between TWC and ISP or OLP upon notice to me.

(j) All use of my Services, whether or not authorized by me, will be deemed my use and I will be responsible in all respects for all such use, including for payment of all charges attributable to my account (e.g., for VOD movies, merchandise ordered via Internet, international long distance charges, etc.). TWC is entitled to assume that any communications made through my Services or from the location at which I receive the Services are my communications or have been authorized by me, and I authorize you to provide any Services to the person making such communications. My Services may contain or make available information, content, merchandise, products and Services provided by third parties and for which there may be charges payable to third parties (which may include my choice of ISP or OLP and/or entities affiliated with TWC). I agree that all such charges incurred by me or attributed to my account will be my sole and exclusive responsibility and agree to pay the same when due, and shall indemnify and hold harmless the TWC Parties for all liability for such charges. I agree that TWC is not responsible or liable for the quality of any content, merchandise, products or Services (or the price thereof) made available to me via the Services, for the representations or warranties made by the seller or manufacturer of any such item, or for damage to or injury, if any, resulting from the use of such item.

(k) I acknowledge that currently, and from time to time, there is uncertainty about the regulatory classification of some of the Services TWC provides and, consequently, uncertainty about what fees, taxes and surcharges are due from TWC and/or its customers. Accordingly, I agree that TWC has the right to determine, in its sole discretion, what fees, taxes and surcharges are due and to collect and remit them to the relevant governmental authorities, and/or to pay and pass them through to me. I further agree to waive any claims I may have regarding TWC's collection or remittance of such fees, taxes and surcharges. I further understand that I may obtain a list of the fees, taxes and surcharges that my local TWC office currently collects or passes through by writing to TWC at the following address and requesting same: Time Warner Cable, 7800 Crescent Executive Drive, Charlotte, North Carolina, 28217; Attention: Subscriber Tax Inquiries.

(l) I agree that it is my responsibility to report TWC billing errors within 30 days from receipt of the bill so that service levels and all payments can be verified. If not reported within 30 days, the errors are waived.

(m) I agree that TWC has no obligation to notify me of, or change my rate to reflect, offers it may make to consumers that contain different prices for Services (or packages of Services) that are the same as, or similar to, the Services I receive.

3. Installation; Equipment and Cabling

(a) If I am not the owner of the house, apartment or other premises upon which TWC Equipment and Software are to be installed, I warrant that I have obtained the consent of the owner of the premises for TWC personnel and/or its agents to enter the premises for the purposes described in Section 3(d). I agree to indemnify and hold the TWC Parties harmless from and against any claims of the owner of the premises arising out of the performance of this Agreement (including costs and reasonable attorneys' fees).

(b) I authorize TWC to make any preparations to the premises necessary for the installation, maintenance, or removal of equipment. TWC shall not be liable for any effects of normal Services installation and workmanship, such as holes in walls, etc., which may remain after installation or removal of the TWC Equipment, except for damage caused by negligence on the part of TWC.

(c) All converter boxes, cable modems, voice-enabled cable modems, remote control units and any other customer premise equipment or materials provided to me by TWC for use in connection with the receipt of Services is ("Customer Premise Equipment") and at all times shall remain the sole and exclusive personal property of TWC, and I agree that I do not become an owner of any Customer Premise Equipment by virtue of the payments provided for in this Agreement or the Tariff(s) or the attachment of any portion of the Customer Premise Equipment to my residence or otherwise. Upon termination of any Services, subject to any applicable laws or regulations, TWC may, but shall not be obligated to, retrieve any associated TWC Equipment not returned by me as required under Section 3(f) below. TWC will not be deemed to have "abandoned" the TWC Equipment if it does not retrieve such equipment.

(d) I agree to provide TWC and its authorized agents access to my premises during regular business hours upon reasonable notice during the term of this Agreement and after its termination to install, connect, inspect, maintain, repair, replace, alter or disconnect or remove the TWC Equipment, to install Software, to conduct service theft audits, or to check for signal leakage. I agree that TWC may have reasonable access to easements and TWC Equipment located on my grounds.

(e) TWC shall have the right to upgrade, modify and enhance TWC Equipment and Software from time to time through "downloads" from TWC's network or otherwise. Without limiting the foregoing, TWC may, at any time, employ such means to limit or increase the throughput available through individual cable modems whether or not provided by TWC.

(f) If the Services are terminated, I agree that I have no right to possess or use the TWC Equipment related to the terminated Services. As required under Section 10(b), I agree that I must arrange for the return of TWC Equipment to TWC, in the same condition as when received (excepting ordinary wear and tear), upon termination of the Services. If I do not promptly return the TWC Equipment or schedule with TWC for its disconnection and removal, TWC may enter any premises where the TWC Equipment may be located for the purpose of disconnecting and retrieving the TWC Equipment. I will pay any expense incurred by TWC in any retrieval of the unreturned TWC Equipment. TWC may charge me a continuing monthly fee until any outstanding TWC Equipment is returned, collected by TWC or fully paid for by me in accordance with Section 3(g). The current fee is listed in the list of charges on the price list or can be provided on request.

(g) I agree to pay TWC liquidated damages in the amount demanded by TWC, but not to exceed that specified in the then-current price list, for the replacement cost of the TWC Equipment without any deduction for depreciation, wear and tear or physical condition of such TWC Equipment if (i) I tamper with, or permit others to tamper with, TWC Equipment, (ii) the TWC Equipment is destroyed, lost, or stolen, whether or not due to circumstances beyond my

reasonable control, and even if I exercised due care to prevent such destruction, loss, or theft, or (iii) the TWC Equipment is damaged (excluding equipment malfunction through no fault of my own) while in my possession, whether or not due to circumstances beyond my reasonable control, and even if I exercised due care to prevent such damage. I agree that these liquidated damages are reasonable in light of the problem of theft of cable Services; the existence of a "black market" in TWC Equipment; the ability of third parties to steal Services with unlawfully obtained TWC Equipment, causing loss of revenues for installation and service fees; and the difficulty in determining the actual damages that arise from the unauthorized tampering with, loss, destruction, or theft of TWC Equipment. I agree to return any damaged TWC Equipment to TWC.

(h) I agree that TWC may place equipment and cables on my premises to facilitate the provision of Services to me and to other locations in my area. The license granted under this Section 3(h) will survive the termination of this Agreement until the date that is one year from the date on which I first notify TWC in writing that I am revoking such license.

4. Use of Services; TWC Equipment and Software

(a) I agree that TWC has the right to add to, modify, or delete any aspect, feature or requirement of the Services (including content, price, equipment and system requirements). I further agree that my ISP (and, if applicable, OLP) has the right to add to, modify, or delete any aspect, feature or requirement of the HSD Service (including content, price and system requirements). If TWC changes its equipment requirements with respect to any Services, I acknowledge that I may not be able to receive such Services utilizing my then-current equipment. Upon any such change, my continued use of Services will constitute my consent to such change and my agreement to continue to receive the relevant Services, as so changed, pursuant to this Agreement, the Terms of Use and the Tariff(s). If I participate in a promotional offer for any Service(s) that covers a specified period of time, I agree that I am assured only that I will be charged the promotional price for such Service(s) during the time specified. I agree that TWC shall have the right to add to, modify, or delete any aspect, feature or requirement of the relevant Service(s), other than the price I am charged, during such promotional period.

(b) I agree that the Services I have requested are residential Services, offered for reasonable personal, non-commercial use only. I will not resell or redistribute (whether for a fee or otherwise) the Services, or any portion thereof, or charge others to use the Services, or any portion thereof. Among other things:

(i) If I receive Video Service, I agree not to use the Services for the redistribution or retransmission of programming or for any enterprise purpose whether or not the enterprise is directed toward making a profit. I agree that, among other things, my use of the Services to transmit or distribute the Video Service, or any portion thereof, to (or to provide or permit access by) persons outside the location identified in the Work Order (even if to a limited group of people or to other residences that I own or have the right to use), will constitute an enterprise purpose. I acknowledge that programs and other materials that I receive as part of the Video Service remain part of the Video Service even if I record or capture all or a portion of any such program or material in a data file or on a hard drive, DVR or similar device.

(ii) If I receive Digital Phone Service, I agree not to use the Services for telemarketing, call center, medical transcription or facsimile broadcasting Services or for any enterprise purpose whether or not the enterprise is directed toward making a profit. I agree that, among other things, my use of the Services to make available my Digital Phone Service, or any portion thereof, to (or to provide or permit access by) persons outside the location identified in the Work Order (even if to a limited group of people

or to other residences that I own or have the right to use), will constitute an enterprise purpose.

(iii) If I receive HSD Service, I agree not to use the HSD Service for operation as an Internet service provider, for the hosting of websites (other than as expressly permitted as part of the HSD Service) or for any enterprise purpose whether or not the enterprise is directed toward making a profit. I agree that, among other things, my use of any form of transmitter or wide area network that enables persons or entities outside the location identified in the Work Order to use my Services, whether or not a fee is sought, will constitute an enterprise purpose. Furthermore, if I use a wireless network within my residence, I will limit wireless access to the HSD Service (by establishing and using a secure password or similar means) to the members of my household.

(c) Theft or willful damage, alteration, or destruction of TWC Equipment, or unauthorized reception, theft or diversion of Services, or assisting such theft, diversion, or unauthorized reception is a breach of this Agreement and potentially punishable under law (including by way of statutory damages, fine and/or imprisonment). Nothing in this Agreement, including, Section 3(g) above, shall prevent TWC from enforcing any rights it has with respect to theft or unauthorized tampering of Services or TWC Equipment under applicable law.

(d) I will not, nor will I allow others to, open, alter, misuse, tamper with or remove the TWC Equipment as and where installed by TWC or use it contrary to this Agreement, the Terms of Use, or the Tariff(s). I will not, nor will I allow others to, remove any markings or labels from the TWC Equipment indicating TWC ownership or serial or identity numbers. I will safeguard the TWC Equipment from loss or damage of any kind, including accidents, breakage or house fire, and will not permit anyone other than an authorized representative of TWC to perform any work on the TWC Equipment.

(e) I agree that to the extent any Software is licensed (or sublicensed) to me by TWC, such Software is provided for the limited purpose of facilitating my use of the Services as described in this Agreement. I will not engage in, or permit, any additional copying, or any translation, reverse engineering or reverse compiling, disassembly or modification of or preparation of any derivative works based on the Software, all of which are prohibited. I will return or destroy all Software provided by TWC and any related written materials promptly upon termination of the associated Services to me for any reason. Software licensed to me by my ISP or OLP, for instance my ISP's or OLP's client or browser software, is licensed under the ISP Terms or OLP Terms, as applicable, and is not the responsibility of TWC.

(f) I agree that I will use the Services for lawful purposes only, and in accordance with this Agreement, the Terms of Use and the Tariff(s).

(g) I agree to be responsible for protecting the confidentiality of my screen names, passwords, personal identification numbers (PINs), parental control passwords or codes, and any other security measures made available, recommended or required by Time Warner Cable. To the extent this information is acquired by any other person (through no fault of TWC), TWC may assume that I have authorized such person's use of the information. I also acknowledge that TWC's Services may from time to time include interactive features, the use of which may result in the transmission to, and use by, TWC or certain third parties of information that may constitute personally identifiable information (as such term is used in the Federal Communications Act of 1934) about me and for which TWC may be required, under the Federal Communications Act of 1934, to obtain my consent. I agree that TWC may seek such consents (or indications of my election to "opt in" to certain TWC programs) electronically, including through the use of a "click through" screen, and that TWC is entitled to assume that any such

consent or opt-in election communicated through my Services or from the location at which I receive the Services is my consent or opt-in election or has been authorized by me.

(h) I agree that TWC has no liability for the completeness, accuracy or truth of the programs or information it transmits.

(i) Data Storage Services. I agree that any online or physical data storage services provided to me by TWC are used at my sole risk and that TWC will have no liability in the event my data is corrupted or lost as a result of or while using such services. I agree that when I return TWC Equipment to TWC, I am responsible for ensuring that all of my data is removed from such TWC Equipment and acknowledge that TWC has no responsibility for any such data that I do not remove.

5. Special Provisions Regarding Digital Phone Service

(a) I acknowledge that the voice-enabled cable modem used to provide the Digital Phone Service is electrically powered and that the Digital Phone Service, including the ability to access 911 Services and home security and medical monitoring Services, may not operate in the event of an electrical power outage or if my broadband cable connection is disrupted or not operating. I acknowledge that, in the event of a power outage in my home, any battery included in my voice-enabled cable modem may enable back-up service for a limited period of time or not at all, depending on the circumstances, and that inclusion of the battery does not ensure that Digital Phone Service will be available in all circumstances. I also acknowledge that, in the event of a loss of power that disrupts my local TWC cable system, the battery in my voice-enabled cable modem will not provide back-up service and the Digital Phone Service will not be available.

(b) I agree that TWC will not be responsible for any losses or damages arising as a result of the unavailability of the Digital Phone Service, including the inability to reach 911 or other emergency Services, or the inability to contact my home security system or remote medical monitoring service provider. I acknowledge that TWC does not guarantee that the Digital Phone Service will operate with my home security and/or medical monitoring systems, and that I must contact my home security or medical monitoring provider in order to test my system's operation with the Digital Phone Service. I agree that I am responsible for the cost of any such testing or any fees for configuring my home security or medical monitoring system to work with the Digital Phone Service.

(c) The location and address associated with my Digital Phone Service will be the address identified on the Work Order. I acknowledge that, under Section 4(d) of this Agreement, I am not permitted to move TWC Equipment from the location and address in which it has been installed. Furthermore, if I move my voice-enabled cable modem to an address different than that identified on the Work Order, calls from such modem to 911 will appear to 911 emergency service operators to be coming from the address identified on the Work Order and not the new address.

(d) I agree to provide TWC and its authorized agents with access to my telephone inside wiring at the Network Interface Device or at some other minimum point of entry in order to provide the Digital Phone Service over my existing in-home wiring.

(e) I agree that in the event of a material error or omission affecting my directory listing information, regardless of form or fault by TWC, including the erroneous inclusion in published directory listings of any information that I intend not to have published, my sole remedy shall be a service credit in an amount set by TWC's then-current standard policies or an amount prescribed by applicable regulatory requirements, whichever is greater. TWC shall have no other liability for errors, omissions or mistaken inclusions in directory listings.

6. Special Provisions Regarding HSD Service

(a) Description of HSD Service.

(i) I acknowledge that each tier or level of the HSD Service has limits on the Maximum Throughput Rate at which I may send and receive data at any time, as set forth in the price list or Terms of Use, and that the Maximum Throughput Rate may be achieved in bursts, but generally will not be sustained on a consistent basis due to the nature of the Internet, the protocols used to transmit data to and from the Internet, and TWC's facilities. I also understand that the actual Throughput Rate I may experience at any time will vary based on numerous factors, such as the condition of wiring at my location, computer configurations, Internet and TWC network congestion, the time of day at which I use the HSD Service, and the website servers I access, among other factors. Additionally, Throughput Rate may be affected by Network Management Tools, the prioritization of TWC commercial subscriber traffic and network control information, and necessary bandwidth overhead used for protocol and network information.

(ii) I agree that TWC or ISP may change the Maximum Throughput Rate of any tier by amending the price list or Terms of Use. My continued use of the HSD Service following such a change will constitute my acceptance of any new Maximum Throughput Rate. If the level or tier of HSD Service to which I subscribe has a specified limit on the amount of bytes that I can use in a given billing cycle, I also agree that TWC may use technical means, including but not limited to suspending or reducing the speed of my HSD Service, to ensure compliance with these limits, and that TWC or ISP may move me to a higher tier of HSD Service (which may result in higher monthly charges) or impose other charges and fees if my use exceeds these limits.

(iii) I agree that TWC may use Network Management Tools as it determines appropriate and/or that it may use technical means, including but not limited to suspending or reducing the Throughput Rate of my HSD Service, to ensure compliance with its Terms of Use and to ensure that its service operates efficiently. I further agree that TWC and ISP have the right to monitor my bandwidth usage patterns to facilitate the provision of the HSD Service and to ensure my compliance with the Terms of Use and to efficiently manage their networks and their provision of services. TWC or ISP may take such steps as each may determine appropriate in the event my usage of the HSD Service does not comply with the Terms of Use. I acknowledge that HSD Service does not include other services managed by TWC and delivered over TWC's shared infrastructure, including Video Service and Digital Phone Service.

(b) I may rent a cable modem from TWC or may purchase a DOCSIS-compliant, TWC-approved cable modem from a third party provider. TWC reserves the right to provide service only to users with TWC-approved DOCSIS-compliant modems. Modems not TWC-approved may not function as intended and may not receive TWC advertised services.

(c) Republication.

(i) I acknowledge that material posted or transmitted through the HSD Service may be copied, republished or distributed by third parties, and that the TWC Parties will not be responsible for any harm resulting from such actions.

(ii) I grant to TWC, and I represent, warrant and covenant that I have all necessary rights to so grant, the non-exclusive, worldwide, royalty-free, perpetual, irrevocable, right and license to use, reproduce, modify, adapt, publish, translate, distribute, perform and display in any media all material posted on the public areas of the HSD Service via my account and/or to

incorporate the same in other works, but only for purposes consistent with operation and promotion of the HSD Service.

(iii) I agree that unsolicited email, or "spam," is a nuisance and that TWC and my ISP (and, if applicable, my OLP) are entitled to establish limits on the volume of email that I send. Such volume limits may be set by reference to a number of emails per day, week, month or year.

(d) Continuity of Service. In order to provide continuity of service to me, if my choice of ISP is no longer available over my local TWC cable system, I agree that TWC may provide me with an alternative ISP. In such event, TWC will notify me of the date as of which I will begin receiving service from the alternative ISP, the provision of which shall also be governed by this Agreement, and TWC will provide to me a price list for such alternative ISP service. I will have the right at any time to terminate the alternative ISP or to change my subscription to any other ISP then offered by TWC.

(e) Unfiltered Internet Access. I acknowledge that the ISP Service provides a connection to the Internet that may be unfiltered, and that the TWC Parties neither control nor assume responsibility for any content on the Internet or content that is posted by a subscriber. Although TWC or my ISP or OLP may make available certain parental control features, I acknowledge that such parental control features may not be entirely effective or foolproof and that, notwithstanding such features, I or members of my household may be exposed to unfiltered content.

(f) Use of ISP and OLP Service. I agree that TWC and/or my ISP and/or OLP has the right, but not the obligation, to edit, refuse to post or transmit, request removal of, or remove or block any material transmitted through, submitted to or posted on the HSD Service, if it determines in its discretion that the material violates the terms of this Agreement, any TWC consumption limits or any other Terms of Use. Such material might include personal home pages and links to other sites. In addition, I agree that, under such circumstances, TWC may suspend my account, take other action to prevent me from utilizing certain account privileges (e.g., home pages) or cancel my account without prior notification. I also agree that TWC and/or ISP and/or OLP may suspend or cancel my account for using all or part of the HSD Service in a manner that violates this Agreement or the Terms of Use.

(g) Responsibility for HSD Service. Each of TWC and my ISP (and, if applicable, my OLP) has responsibilities for the HSD Service. I acknowledge that each of my ISP and OLP may have one or more separate agreements, policies or other terms covering my rights and obligations with regard to the HSD Service ("ISP Terms" or "OLP Terms," as applicable) that are also binding on me. This Agreement does not cover any ISP or OLP features or Services that are not dependent upon distribution over TWC's cable systems (for example, dial up access or my use of ISP or OLP software that enables access to ISP or OLP features or Services through non-TWC access means) or that may otherwise be provided to me by ISP or OLP separately from the HSD Service under the ISP Terms or OLP Terms, as applicable. In the event of termination of the HSD Service, I must also contact my ISP (and, if applicable, my OLP) to ensure that these other features or Services (such as dial-up access) are properly continued or discontinued.

(h) Computer Requirements. I agree that each Computer will need to meet certain minimum hardware and software requirements that will be specified for the HSD Service, and that such requirements may be changed from time to time by TWC or my ISP or OLP.

7. Support; Service and Repairs

(a) My Services include the right to request reasonable service and maintenance calls to check and correct problems with the Services. TWC will, at its own expense, repair damage to or, at TWC's option, replace TWC Equipment, and otherwise attempt to correct interruptions of the Services, due to reasonable TWC Equipment wear and tear, or technical malfunction of the system or network operated by TWC. The Subscriber Materials contain details on contacting TWC for this support.

(b) Unless I have obtained a TWC service protection plan (if available in my area), I agree that I am responsible for all wiring, equipment and related software installed in my residence that is not TWC Equipment or TWC-licensed Software and TWC will have no obligation to install, connect, support, maintain, repair or replace any Computer, television, telephone or telephone answering device, audiovisual recording or playback device (e.g., VCR, DVR, DVD), audio equipment, any software, or any cable modem, cabling or other equipment (other than TWC Equipment or TWC-licensed Software). TWC will not support, repair, replace, or maintain any Network Interface Card, regardless of whether provided and installed by TWC.

(c) I agree that TWC has no responsibility for the operation of any equipment, software or service other than the Services, the TWC Equipment and the TWC-licensed Software. For instance, I acknowledge that certain commercially available televisions, converter boxes and recording devices, which may be identified by their manufacturers as "cable ready" or "digital cable ready," may not be able to receive or utilize all available Services without the addition of a TWC converter box or other TWC Equipment for which a fee may be charged. I further acknowledge that, even if TWC furnishes other TWC Equipment to me that is compatible with my equipment, my equipment may not receive all Services available to customers using a TWC converter box. If I receive HSD Service, TWC has no responsibility to support, maintain or repair any equipment, software or service that I elect to use in connection with the HSD Service, whether provided by my ISP, my OLP or a third party. For assistance with technical problems arising from such equipment, software or Services, I should refer to the Subscriber Materials for information regarding the technical support provided by my ISP or OLP or to the support area of the ISP or OLP or to the relevant third party's material.

(d) If TWC determines that non-TWC cabling or equipment connecting my residence to TWC Equipment installed on the side of or adjacent to my residence (i.e., at a ground block) is the cause of a service problem, I agree that TWC may charge me to resolve such service problem. If available from TWC in my area, I may subscribe to a TWC service protection plan that covers service related calls within my residence. If any other support Services are available from TWC, such Services will be at additional charges as described in TWC's price list.

8. Service Interruptions; Force Majeure

(a) I agree that TWC has no liability for delays in or interruption to my Services except that, if for reasons within TWC's reasonable control, for more than twenty-four (24) consecutive hours, (i) service on all cable channels is interrupted, (ii) there is a complete failure of the HSD Service or (iii) there is a complete failure of the Digital Phone Service, TWC will give me a prorated credit for the period of such interruption or failure if I request one within 30 days of the interruption or failure. Notwithstanding the above, TWC will issue credits for VOD, pay-per-view and pay-per-play events for service problems where a credit request is made within 30 days of the interruption or failure. In no event shall TWC be required to credit me an amount in excess of applicable service fees. TWC will make any such credit on the next practicable bill for my Services. State and local law or regulation may impose other outage credit requirements with respect to some or all of my Services. In such event, the relevant law or regulation will control.

(b) I acknowledge that TWC may conduct maintenance from time to time that may result in interruptions of my Services.

(c) The TWC Parties shall have no liability, except as set forth in Section 8(a), for interruption of the Services due to circumstances beyond its reasonable control, including acts of God, flood, natural disaster, vandalism, terrorism, regulation or governmental acts, fire, civil disturbance, electrical power outage, computer viruses or worms, strike or weather.

(d) TWC is only obligated to provide the above-referenced credits for loss of Services if TWC is billing me for the relevant Service at the time of the outage. If a third party, including my ISP or OLP, is billing me, I will look solely to such third party for a credit with respect to that Service.

9. Review and Enforcement

(a) TWC may suspend or terminate all or a portion of my Services without prior notification if TWC determines in its discretion that I have violated this Agreement, any of the Terms of Use or any Tariff(s), even if the violation was a one-time event. If all or a portion of my Services are suspended for more than 24 hours, I will not be charged for the relevant Services during the suspension. If my account is terminated, I will be refunded any pre-paid fees minus any amounts due TWC.

(b) If I receive HSD Service, I acknowledge that TWC has the right, but not the obligation, to review content on public areas of the HSD Service, including chat rooms, bulletin boards and forums, in order to determine compliance with this Agreement and the Terms of Use.

(c) I agree that TWC shall have the right to take any action that TWC deems appropriate to protect the Services, TWC's facilities or TWC Equipment.

10. Termination of Service

(a) Either TWC or I, each in our sole discretion, may terminate all or any portion of my Services at any time for any or no reason, in its sole discretion, in accordance with applicable law.

(b) If I am moving or wish to terminate all or any portion of my Services for any reason, I will notify TWC by phone or by mail as instructed in the Subscriber Materials in order to set up a disconnect appointment and provide TWC with access to my premises to disconnect the relevant Services and recover the TWC Equipment specified on the Work Order on a DATE PRIOR TO the last day of residency. This also applies if I am receiving a period of free or discounted Services. In other words, at the end of the free or discounted period, TWC is entitled to begin billing me for the usual charges associated with the relevant Services unless I take the appropriate steps to terminate the Services as described in this paragraph.

(c) I cannot terminate my Services by writing "Canceled" (or any other messages) on my bill or check, or by making a disconnect appointment that does not result in TWC's physical recovery of the TWC Equipment. In addition, I agree that any restrictive endorsements (such as "paid in full"), releases or other statements on or accompanying checks or other payments accepted by TWC shall have no legal effect.

(d) I acknowledge that notice given by me to TWC of termination of any Services may not be sufficient to terminate billing by any third party for additional or continuing Services, for example, billing by my ISP or OLP for continuing "dial up" access. I agree that I am solely responsible for contacting any such third party in addition to TWC to ensure that all such Services are terminated in accordance with the third party's terms of service, if applicable.

11. Disclaimer of Warranty; Limitation of Liability

(a) I AGREE THAT THE SERVICES ARE PROVIDED BY TWC ON AN "AS IS" AND "AS AVAILABLE" BASIS WITHOUT WARRANTIES OF ANY KIND, EITHER EXPRESS OR IMPLIED, INCLUDING WARRANTIES OF TITLE OR NONINFRINGEMENT OR IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, OTHER THAN THOSE WARRANTIES THAT ARE IMPLIED BY, AND INCAPABLE OF EXCLUSION, RESTRICTION OR MODIFICATION UNDER, THE LAWS APPLICABLE TO THIS AGREEMENT. TWC MAKES NO WARRANTY THAT THE SERVICES WILL BE UNINTERRUPTED OR ERROR FREE, SECURE, OR FREE OF VIRUSES, WORMS, DISABLING CODE OR CONDITIONS, OR THE LIKE, OR THAT THE TWC EQUIPMENT WILL OPERATE AS INTENDED. IN PARTICULAR, I AGREE THAT MY USE OF THE HSD SERVICE (INCLUDING THE CONTENT, INFORMATION, SERVICES, EQUIPMENT AND SOFTWARE, THE PURCHASE OF MERCHANDISE AND SERVICES, THE TRANSMISSION OF INFORMATION AND OTHER COMMUNICATIONS BY AND TO ME AND THE DOWNLOADING OF COMPUTER FILES) IS AT MY SOLE RISK AND THAT TWC DOES NOT WARRANT THAT THE HSD SERVICE OR EQUIPMENT PROVIDED BY TWC WILL PERFORM AT A PARTICULAR SPEED, BANDWIDTH OR THROUGHPUT RATE. I FURTHER AGREE THAT TWC IS NOT RESPONSIBLE FOR THE RECORDING OF OR FAILURE TO RECORD ANY PROGRAM OR PORTION THEREOF, OR FOR THE CONTENT OF ANY PROGRAM OR CONTENT ON MY DVR. WITHOUT LIMITING THE FOREGOING:

(i) ANY AND ALL PRODUCTS AND SERVICES PROVIDED BY TWC AND/OR ISP AND/OR OLP AND/OR ANY LONG DISTANCE PROVIDER AND/OR OTHER THIRD PARTY TO ME THAT ARE NOT PART OF THE SERVICES AS DEFINED HEREIN ARE OUTSIDE THE SCOPE OF THIS AGREEMENT AND THE TWC PARTIES HAVE NO RESPONSIBILITY OR LIABILITY FOR ANY SUCH PRODUCTS OR SERVICES; AND

(ii) NONE OF THE TWC PARTIES MAKES ANY WARRANTIES AS TO THE SECURITY OF MY COMMUNICATIONS VIA TWC'S FACILITIES OR THE SERVICES (WHETHER SUCH COMMUNICATIONS ARE DIRECTED WITHIN THE SERVICES, OR OUTSIDE THE SERVICE TO OR THROUGH THE INTERNET), OR THAT THIRD PARTIES WILL NOT GAIN UNAUTHORIZED ACCESS TO OR MONITOR MY EQUIPMENT OR COMMUNICATIONS. I AGREE THAT NONE OF THE TWC PARTIES WILL BE LIABLE FOR ANY SUCH UNAUTHORIZED ACCESS. I HAVE THE SOLE RESPONSIBILITY TO SECURE MY EQUIPMENT AND COMMUNICATIONS.

(b) I ACKNOWLEDGE THAT TWC'S OR MY INSTALLATION, USE, INSPECTION, MAINTENANCE, REPAIR, REPLACEMENT OR REMOVAL OF THE SERVICES, TWC EQUIPMENT AND SOFTWARE MAY RESULT IN DAMAGE TO MY COMPUTER(S), TELEPHONES AND TELEPHONE ANSWERING DEVICES, TELEVISIONS, RECORDING AND PLAYBACK DEVICES, AUDIO EQUIPMENT, OR ANY CABLE MODEM, CABLING OR OTHER EQUIPMENT OR HARDWARE, INCLUDING SOFTWARE AND DATA FILES STORED THEREON. I SHALL BE SOLELY RESPONSIBLE FOR BACKING UP ALL EXISTING COMPUTER OR OTHER SOFTWARE OR DATA FILES PRIOR TO THE PERFORMANCE OF ANY OF THE FOREGOING ACTIVITIES. NONE OF THE TWC PARTIES, OR THEIR VENDORS, LICENSEES OR PROGRAMMERS, SHALL HAVE ANY LIABILITY, AND EACH EXPRESSLY DISCLAIMS ANY RESPONSIBILITY WHATSOEVER, FOR ANY DAMAGE TO OR LOSS OR DESTRUCTION OF ANY EQUIPMENT, SOFTWARE, HARDWARE, DATA OR FILES.

(c) EXCEPT FOR THE REFUND OR CREDIT AS EXPRESSLY PROVIDED IN SECTIONS 9(a) AND 8(a) RESPECTIVELY, IN NO EVENT (INCLUDING NEGLIGENCE) WILL ANY TWC PARTY OR ANY PERSON OR ENTITY INVOLVED IN CREATING, PRODUCING OR DISTRIBUTING THE SERVICES (INCLUDING THE CONTENT INCLUDED THEREIN OR THE SERVICES ACCESSED THEREBY) OR EQUIPMENT BE LIABLE FOR ANY DIRECT, INDIRECT, INCIDENTAL, SPECIAL OR CONSEQUENTIAL DAMAGES ARISING OUT OF THE USE OF OR INABILITY TO USE THE SERVICES, INCLUDING THE USE OF OR INABILITY TO USE EMERGENCY 911 SERVICES; FOR ANY ERRORS, OMISSIONS, MISTAKEN INCLUSIONS OR PUBLICATION OF ANY DIRECTORY LISTING INFORMATION, REGARDLESS OF FORM; FOR ANY ACTION TAKEN BY TWC TO PROTECT THE SERVICES; OR THE BREACH BY TWC OF ANY WARRANTY.

(d) I AGREE THAT THE PROVISIONS OF THIS SECTION 11 SHALL APPLY TO ALL CONTENT OR SERVICES INCLUDED IN, OR ACCESSIBLE THROUGH, THE SERVICES, AND ARE FOR THE BENEFIT OF, AND MAY BE ENFORCED BY, ALL OF THE TWC PARTIES.

12. Privacy

(a) My privacy interests, including my ability to limit disclosure of certain information to third parties, may be addressed by, among other laws, the Federal Communications Act of 1934, as amended, and the Electronic Communications Privacy Act. Personally identifiable information that may be collected, used or disclosed in accordance with applicable laws is described in the Subscriber Privacy Notice delivered to me by TWC on its own behalf and on behalf of its Affiliated ISPs. I acknowledge receipt of the Subscriber Privacy Notice, which is deemed to form a part of this Agreement, and expressly consent to the collection, use and disclosure of personally identifiable and other information as described in the Subscriber Privacy Notice, as it may be amended from time to time.

(b) I agree that, in addition to actions and disclosures specifically authorized by law or statute or authorized elsewhere in this Agreement, TWC and its Affiliated ISPs shall each have the right (except where prohibited by law notwithstanding my consent), but not the obligation, to disclose any information to protect their respective rights, property and/or operations, or where circumstances suggest that individual or public safety is in peril. I consent to such actions or disclosures.

(c) If I am a Digital Phone customer, I consent to TWC's disclosure of my name, address and/or telephone number to the general public in connection with Caller ID functions, telephone directories and 411 services. If I wish to have TWC remove this information from one or more of these Services, I understand that I may direct TWC to do so, subject to any applicable fees. I also consent to TWC's disclosure of my name, address and/or telephone number in response to 911 and similar public safety requests and to the telephone companies serving those end users to whom I make calls so that the calls can be completed.

13. Consent to Phone and Email Contact

(a) I consent to TWC calling the phone numbers I supply to it for any purpose, including the marketing of its current and future Services. I agree that these phone calls may be made using any method, including an automatic dialing system or an artificial or recorded voice. Upon my request, the phone numbers I have previously provided will be removed from TWC's phone marketing list. I can make this request by calling or writing my local TWC office and asking to be placed on TWC's Do Not Call List.

(b) I acknowledge that being included in any state or federal "do not call" registry will not be sufficient to remove me from TWC's phone marketing list.

(c) I consent to TWC emailing me, at any email address, including that of a wireless or mobile device, that I provide to TWC (or that TWC issues to me in connection with the Service), for any purpose, including the marketing of TWC's current and future Services. If my wireless or mobile provider charges me for receipt of such messages, I acknowledge and agree that I am responsible for paying such charges. I may revoke this authorization insofar as it relates to marketing messages at any time by calling or writing my local TWC office.

14. Arbitration

EXCEPT FOR CLAIMS FOR INJUNCTIVE RELIEF, AS DESCRIBED BELOW, ANY PAST, PRESENT, OR FUTURE CONTROVERSY OR CLAIM ARISING OUT OF OR RELATED TO THIS AGREEMENT SHALL BE RESOLVED BY BINDING ARBITRATION ADMINISTERED BY THE AMERICAN ARBITRATION

ASSOCIATION UNDER ITS COMMERCIAL ARBITRATION RULES, INCLUDING, IF APPLICABLE, THE SUPPLEMENTARY PROCEDURES FOR THE RESOLUTION OF CONSUMER RELATED DISPUTES. CONSOLIDATED OR CLASS ACTION ARBITRATIONS SHALL NOT BE PERMITTED. THE ARBITRATOR OF ANY DISPUTE OR CLAIM BROUGHT UNDER OR IN CONNECTION WITH THIS AGREEMENT SHALL NOT HAVE THE POWER TO AWARD INJUNCTIVE RELIEF; INJUNCTIVE RELIEF MAY BE SOUGHT SOLELY IN AN APPROPRIATE COURT OF LAW. NO CLAIM SUBJECT TO ARBITRATION UNDER THIS AGREEMENT MAY BE COMBINED WITH A CLAIM SUBJECT TO RESOLUTION BEFORE A COURT OF LAW. THE ARBITRABILITY OF DISPUTES SHALL BE DETERMINED BY THE ARBITRATOR. JUDGMENT UPON AN AWARD MAY BE ENTERED IN ANY COURT HAVING COMPETENT JURISDICTION. IF ANY PORTION OF THIS SECTION IS HELD TO BE UNENFORCEABLE, THE REMAINDER SHALL CONTINUE TO BE ENFORCEABLE, EXCEPT THAT IF THE PROHIBITION AGAINST CONSOLIDATED OR CLASS ACTION ARBITRATIONS SET FORTH ABOVE IS FOUND TO BE UNENFORCEABLE, THEN THE ENTIRETY OF THIS ARBITRATION CLAUSE SHALL BE NULL AND VOID.

15. Definitions

(a) "Affiliated ISP" means Road Runner and any other ISP in which any TWC Party holds an ownership interest.

(b) "Agreement" means this Services Subscription Agreement, as it may be amended from time to time by TWC.

(c) "Computer" means the personal computer(s) located at my residence that will be used to access the HSD Service, as specified on the accompanying Work Order.

(d) "Digital Phone Service" means the TWC phone service that provides users with the ability to send and receive local and/or long distance calls and to access additional related features and functions through TWC's cable systems.

(e) "DVR" means a set-top box or other device enabled with a digital video recorder that is provided to me by TWC.

(f) "HSD Service" and "High Speed Data Service" mean the online content, features, functions and Services (which may include Internet access) of the ISP or OLP selected by me, as provided over TWC's cable systems.

(g) "including" or "include" shall mean inclusion, without limitation.

(h) "ISP" means the Internet service provider selected by me from among those offered now or in the future by TWC for the HSD Service. My ISP is the entity that provides my Internet connectivity.

(i) "Maximum Throughput Rate" means the highest Throughput Rate provided by the level or tier of HSD Service to which I subscribe.

(j) "Me," "My," and "I" mean the account holder identified on the Work Order who is authorized by TWC to access and use the Services.

(k) "Network Management Tools" means tools and techniques that may be used by TWC as it determines appropriate in order to efficiently manage its network, ensure a quality user experience for its subscribers and ensure compliance with the Acceptable Use Policy. Examples of Network Management Tools can be found in the Acceptable Use Policy, http://help.twcable.com/html/twc_misp_aup.html

(l) "OLP" or "On-line Provider" means a provider of on-line content, features, functions and Services that are used in conjunction with my ISP Service (and whose service may be purchased with an ISP Service as part of a combined offering) but that does not itself provide Internet connectivity.

(m) "Services" means any and all Services provided to me by TWC, which may include Video Service, High Speed Data Service, Digital Phone Service and equipment based Services such as digital video recorder Services.

(n) "Software" means the computer software, if any, licensed by ISP or OLP to me to access the HSD Service, or licensed by TWC to me to facilitate installation or use of my ISP's or OLP's service or any other Services. Software also refers to any executable code that may be included in, downloaded to, or utilized by, any TWC Equipment.

(o) "Subscriber Materials" means the handbooks, manuals and other guide materials provided by TWC or any third party (including my ISP or OLP) regarding use of the Services.

(p) "Subscriber Privacy Notice" means the Subscriber Privacy Notice described in Section 12(a), as it may be amended from time to time by TWC.

(q) "Tariff(s)" means the materials describing the terms upon which TWC offers Digital Phone Service, which have been filed at the Public Service Commission or comparable state agency serving the jurisdiction in which I live.

(r) "Terms of Use" shall mean all rules, terms and conditions set forth in this Agreement or otherwise established now or hereafter by TWC regarding permissible or impermissible uses of or activities related to, the HSD Service.

(s) "Throughput Rate" refers to the amount of data that can be transferred between my location and the TWC facilities serving my location over a given period of time. Throughput Rates described in all TWC materials, including marketing materials, price lists and Terms of Use refer to Maximum Throughput Rates.

(t) "TWC" means the local Time Warner Cable-affiliated cable operator that is providing the Services over its cable system, or any cable operator to whom TWC assigns this Agreement.

(u) "TWC Equipment" means any equipment provided by TWC to me including, but not limited to, wire, cable, cable conduit, splitters, junction boxes, converter boxes (also known as "set top" boxes), decoders, CableCARD™, terminals, cable modems, voice-enabled cable modems, remote control units, and any other equipment or materials provided to me by TWC for use in connection with the receipt of Services. TWC Equipment does not include any Network Interface Card ("NIC") installed in my Computer.

(v) "TWC Parties" means TWC and its corporate parents, affiliates and subsidiaries and their respective directors, officers, employees and agents.

(w) "Video Service" means video and/or audio programming Services such as basic, standard, digital and premium Services, Services provided on a per-channel or per-program basis, pay-per-play, pay-per-view or VOD.

(x) "VOD" means video on demand.

(y) "Work Order" means the Time Warner Cable work order provided to me on or after January 1, 2006 in connection with the installation or commencement of my Service(s).

16. Indemnification

I agree to defend, indemnify and hold harmless the TWC Parties from and against any and all claims and expenses, including reasonable attorneys' fees, arising out of or related in any way to my use of the Services or otherwise arising out of the use of my account or any equipment or facilities in connection therewith, or my use of any other TWC products or Services or any ISP's or OLP's products or Services.

17. Term

This Agreement will remain in effect until terminated by either party or superseded by a revised Subscription Agreement.

18. Interpretation; Severability

Except as explicitly stated in Section 14, in the event that any portion of this Agreement is held to be invalid or unenforceable, the invalid or unenforceable portion shall be construed in accordance with applicable law as nearly as possible to reflect the original intentions of the parties as set forth herein, and the remainder of this Agreement shall remain in full force and effect.

19. Consent to Electronic Notice

I agree that unless otherwise specified, all notices required or contemplated hereunder will be provided by TWC by such means as TWC shall determine in its discretion. Without limiting the foregoing, I agree that TWC may provide any notices required or contemplated hereunder or by applicable law, including notice of changes to this Agreement, the Terms of Use, the Tariff(s) or the Privacy Notice, by electronic means (for example, email or online posting). An online version of this Agreement, the Terms of Use, the Subscriber Privacy Notice and any applicable Tariff(s), as so changed from time to time, will be accessible at http://help.twcable.com/html/policies.html or another online location designated by TWC, or can be obtained by calling my local TWC office.

20. Waiver

I agree that failure by TWC to enforce any of its rights hereunder shall not constitute a waiver of any such rights. No waiver by either party of any breach or default shall be deemed to be a waiver of any preceding or subsequent breach or default.

21. Assignment

I understand that my Services are being provided only to the location identified on my Work Order and that I am not allowed to transfer all or any portion of the Services, or TWC's Equipment, to any other person, entity or location, including a new residence. I agree that I may not assign or transfer this Agreement. TWC may transfer or assign any portion or all of this Agreement at any time without notice to me, and I waive any such notice which may be required.

22. Effect of Applicable Law; Reservation of Rights

This Agreement, the Work Order and the Terms of Use are subject to all applicable federal, state or local laws and regulations, including any applicable franchise agreement, in effect in the relevant jurisdiction(s) in which I receive my Services. If any provision of this Agreement,

the Work Order or the Terms of Use contravene or are in conflict with any such law or regulation, or if I am entitled to more favorable rights under any such law or regulation than are set forth in any provision in this Agreement, the Work Order or the Terms of Use, then the terms of such law or regulation, or the rights to which I am entitled under such law or regulation, shall take priority over the relevant provision of this Agreement, the Work Order or the Terms of Use. If the relevant law or regulation applies to some but not all of my Service(s), then such law or regulation will take priority over the relevant provision of this Agreement, the Work Order or the Terms of Use only for purposes of those Service(s) to which the law or regulation applies. Except as explicitly stated in this Agreement, nothing contained in this Agreement shall constitute a waiver by me or TWC of any rights under applicable laws or regulations pertaining to the installation, operation, maintenance or removal of the Services, facilities or equipment.

23. Parental Control Device

I acknowledge that I have been advised of the availability of TWC's parental control device which can filter or block certain programming. Additional information about the device is available at the TWC contact number in the Subscriber Materials.

24. Conflicting Terms

In the event of a conflict in the terms and conditions between this Residential Services Subscriber Agreement and the accompanying Work Order, then the terms and conditions of this Agreement shall control.

7/1/09

Exhibit "F" to the Declaration of Todd C. Bank

An Exhibit, Filed as Exhibit "EE," in Support of the Motion for Summary Judgment by Lifetime Entertainment Services, LLC, in *Leyse v. Lifetime Entertainment Services, LLC*, No. 1:13-cv-05794-AKH (S.D.N.Y. May 15, 2015)

Schneier Declaration
Exhibit EE

From: Tracy Barrett Powell <tbpowell@LifetimeTV.com>
Sent: Monday, July 27, 2009 1:20 PM
To: Todd Hatley <thatley@oncallinteractive.com>
Subject: FW: NYC zips
Attach: NYC_Zips for TWC Customers Man BK QNS SI.xls

For Project Runway voice broadcast.

From: Sara Hinzman
Sent: Friday, July 24, 2009 12:27 PM
To: Jane Rice; Tracy Barrett Powell
Subject: NYC zips

From: Hunter, Laurence
To: Sara Hinzman
Cc: Kelly, Barbara
Sent: Fri Jul 24 15:24:20 2009
Subject:
Sarah,

As discussed, please find attached the Zip Code listing for NYC. Please don't hesitate to call if you have questions.

Enjoy your weekend.

Larry

Laurence W. Hunter
Executive Assistant to Barbara Kelly
Time Warner Cable
120 E. 23rd Street
New York, NY 10010
212-598-3427 - phone
212-432-8301 - fax

	A	B
1		
2	Time Warner Cable	
3	New York City	
4	Jan-07	
5		
6	Zip Code	TWC Customers
7	10001	X
8	10002	X
9	10003	X
10	10004	X
11	10005	X
12	10006	X
13	10007	X
14	10009	X
15	10010	X
16	10011	X
17	10012	X
18	10013	X
19	10014	X
20	10016	X
21	10017	X
22	10018	X
23	10019	X
24	10021	X
25	10022	X
26	10023	X
27	10024	X
28	10025	X
29	10026	X
30	10027	X
31	10028	X
32	10029	X
33	10030	X
34	10031	X
35	10032	X
36	10033	X
37	10034	X
38	10035	X
39	10036	X
40	10037	X
41	10038	X
42	10039	X
43	10040	X
44	10044	X
45	10069	X
46	10128	X
47	10162	X
48	10280	X
49	10282	X
50	10463	X
51	11001	X
52	11004	X
53	11005	X
54	11040	X
55	11101	X
56	11102	X
57	11103	X
58	11104	X
59	11105	X

	A	B
60	11106	X
61	11109	X
62	11201	X
63	11205	X
64	11206	X
65	11209	X
66	11211	X
67	11215	X
68	11217	X
69	11218	X
70	11219	X
71	11220	X
72	11222	X
73	11228	X
74	11231	X
75	11232	X
76	11237	X
77	11238	X
78	11354	X
79	11355	X
80	11356	X
81	11357	X
82	11358	X
83	11360	X
84	11361	X
85	11362	X
86	11363	X
87	11364	X
88	11365	X
89	11366	X
90	11367	X
91	11368	X
92	11369	X
93	11370	X
94	11372	X
95	11373	X
96	11374	X
97	11375	X
98	11377	X
99	11378	X
100	11379	X
101	11385	X
102	11411	X
103	11412	X
104	11413	X
105	11414	X
106	11415	X
107	11416	X
108	11417	X
109	11418	X
110	11419	X
111	11420	X
112	11421	X
113	11422	X
114	11423	X
115	11426	X
116	11427	X
117	11428	X
118	11429	X

	A	B
119	11432	X
120	11433	X
121	11434	X
122	11435	X
123	11436	X
124	11691	X
125	11692	X
126	11693	X
127	11694	X
128	11697	X

	A	B
1		
2	Time Warner Cable	
3	Staten Island	
4	Jan-07	
5		
6	Zip Code	TWC Customers
7	10301	X
8	10302	X
9	10303	X
10	10304	X
11	10305	X
12	10306	X
13	10307	X
14	10308	X
15	10309	X
16	10310	X
17	10311	X
18	10312	X
19	10313	X
20	10314	X

Exhibit "G" to the Declaration of Todd C. Bank

An Exhibit, Filed as Exhibit "Z," in Support of the Motion for Summary Judgment by Lifetime Entertainment Services, LLC, in *Leyse v. Lifetime Entertainment Services, LLC*, No. 1:13-cv-05794-AKH (S.D.N.Y. May 15, 2015)

Schneier Declaration

Exhibit Z

From: Sara Hinzman <hinzman@LifetimeTV.com>
Sent: Tuesday, July 21, 2009 9:03 PM
To: Tracy Barrett Powell <tbpowell@LifetimeTV.com>; Jane Rice <jrice@LifetimeTV.com>
Subject: Re: Channel Changing Mktg for TWC NYC

Jane has a call in the morning with the SVP/GM so we should have more time after that.

From: Tracy Barrett Powell
To: Sara Hinzman; Jane Rice
Sent: Tue Jul 21 20:44:39 2009
Subject: RE: Channel Changing Mktg for TWC NYC

Just checking in to see if we have any info from TWC NYC…..the marketing group is very anxious to adjust marketing as needed to ensure viewers find us.

Also – one other tactic we could entertain is a voice broadcast (recorded by Tim) announcing the new channel #.

From: Sara Hinzman
Sent: Monday, July 20, 2009 3:54 PM
To: Jane Rice
Cc: Tracy Barrett Powell
Subject: Channel Changing Mktg for TWC NYC

Hi Jane
After talking with Tracy, here's what we have come up with that we think we should explore with TWC NYC to maximize consumer education--

Tracy Will-

- Pull the Mylifetime.com users in the DMA and we will send an email to them alerting them of the change. Tracy--could the Project Runway folks who have signed up for PRW alerts (like myself) be different than the Mylifetime users and can we pull them too?
- Explore with Consumer Marketing purchasing the channel changing technology for a week targeting prime time on Oxygen
- Discuss with Consumer Marketing splitting the PRW creative in the market (pre and post channel change to put the channel number more prominent)
- Create a specific spot using our Heidi/Tim reads that would talk about the new channel number for TWC to run after the change happens (reads are below)

  Don't miss Project Runway on Lifetime this summer on Time Warner Cable. It's Cable Time!"
  Watch Project Runway on Lifetime with digital cable from Time Warner Cable. Time Warner Cable – The Power of You!

Potential asks from TWC-- in exchange for Lifetime tagging the NYC PRW media with TWC ($11.5K Newspaper, $125.5K Radio & $138.5K Spot TV)

- A crawl on channel 12 saying it's moving the week before the change
- TWC would run for at least 2 weeks after the channel change occurs the custom PRW spots discussing the new channel number
- Explore with TWC the possibility of putting a banner message or alert on the EPG
- HTML email to TWC NYC registered users specifically talking about the new channel with regards to Project Runway (we could put together a sweeps for their registered NYC users as part of the email if they do the rules, we could provide the prize-- 2 seats at the Oct 29th luncheon with Tim Gunn and Nina Garcia)
- We could potentially provide a number of POPs at their retail locations giving away *Marie Claire* subscriptions to drive some retail traffic –via the targeted email (sticker the POP with the new channel number starting on August 19th through the end of the month)

Other things to consider with TWC:
CSR one sheet going with our materials
On Hold message on their ARU (for one week)

Exhibit "H" to the Declaration of Todd C. Bank

An Exhibit, Filed as Exhibit "AA," in Support of the Motion for Summary Judgment by Lifetime Entertainment Services, LLC, in *Leyse v. Lifetime Entertainment Services, LLC*, No. 1:13-cv-05794-AKH (S.D.N.Y. May 15, 2015)

Schneier Declaration
Exhibit AA

From: Kelly, Barbara <barbara.kelly@twcable.com>
Sent: Wednesday, July 22, 2009 7:38 PM
To: Jane Rice <jrice@lifetime tv.com>
Subject: Re: Proposed Tactics for channel change

Absolutely

From: Jane Rice
To: Kelly, Barbara
Sent: Wed Jul 22 17:53:07 2009
Subject: FW: Proposed Tactics for channel change

Hi Barbara,

I just noticed that I sent this to the wrong address and it bounced back. My apologies. Can we chat in the am?

Jane

From: Jane Rice
Sent: Wednesday, July 22, 2009 10:26 AM
To: 'Barabara.kelly@twcable.com'
Subject: Proposed Tactics for channel change

Hi Barbara,

Great chatting with you this morning. As I mentioned given that Season Six of Project Runway will air on August 20th and the timing around the channel change, we'd like to focus our efforts around Lifetime. As such, here's the list of proposed tactics that we would like you to consider and give us some feedback on given capabilities and timing. We'd work with you on all of the scripting and messaging. I'll follow-up with you later today after your internal meeting so that we can confirm which tactics we'll go with and the details around moving forward:

1. Tag all Project Runway media scheduled for NYC with prominent placement of Time Warner Cable and the new channel number (Barbara, I'll get you the full media schedule – the value is around $280K -(includes newspaper, radio & Spot TV)
   Here's the sample script: Watch Project Runway on Channel 62 on Time Warner Cable.
2. Lifetime can purchase an ad buy utilizing your channel changing technology to direct viewers to Lifetime's new location on channel 62
3. TW to explore running a crawl on channel 12 one week prior to the move (schedule and messaging to follow)
4. Lifetime can create a custom spot using Heidi Klum/Tim Gunn that would alert viewers of the new channel number (to run after the change happens) Sample:

   Don't miss Project Runway on Lifetime this summer on Time Warner Cable channel 62. It's Cable Time!" Watch Project Runway on Lifetime with digital cable from Time Warner Cable. Time Warner Cable – The Power of You!

   Barbara – can you let me know how often you will be able to run this spot if we create it for you?
5. Voice broadcast (recorded by Tim Gunn) announcing the new channel # to TW customers or to be utilized for on hold messaging.
6. E-mail to Mylifetime.com registered users in the TW NY footprint alerting them of the change.
7. Explore the possibility of putting a banner message or alert on the EPG
8. HTML email to TWC NYC registered users specifically talking about the new channel with regards to Project Runway (we could put together a sweeps for your registered NYC users as part of the email if you are amenable to doing the rules, we could provide the prize-- 2 seats at the Oct 29th luncheon with Tim Gunn and Nina Garcia in New York City)
9. We could potentially provide a number of POPs at your retail locations giving away *Marie Claire* subscriptions to

drive some retail traffic –via the targeted email (sticker the POP with the new channel number starting on August 19th through the end of the month)

10. CSR one-sheets, trainings

Best,
Jane

Exhibit "I" to the Declaration of Todd C. Bank

Order of Denial of Motion for Summary Judgment by Lifetime Entertainment Services, LLC, in *Leyse v. Lifetime Entertainment Services, LLC*, No. 1:13-cv-05794-AKH (S.D.N.Y. Sept. 22, 2015)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARK LEYSE, individually and on behalf of all others similarly situated,

Plaintiff,

-against-

LIFETIME ENTERTAINMENT SERVICES,

Defendant.

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

13 Civ. 5794 (AKH)

ALVIN K. HELLERSTEIN, U.S.D.J.:

Plaintiff Mark Leyse ("Leyse" or "Plaintiff") brings this putative class action against Defendant Lifetime Entertainment Services, LLC ("Lifetime" or "Defendant") for violations of the Telephone Consumer Protection Act of 1991 ("TCPA"), 47 U.S.C. § 227 *et seq.* Leyse alleges that Lifetime, or a third party acting on its behalf, placed prerecorded calls to his residential phone without his consent, as well as to thousands of others, and seeks statutory damages of $500 per violation, before trebling. On May 15, 2015, Lifetime moved for summary judgment (Dkt. No. 62), and Leyse moved to certify a class (Dkt. No. 69). For the following reasons, both Defendant's motion for summary judgment and Plaintiff's motion for class certification are DENIED.

BACKGROUND

Lifetime is a cable television channel which airs original scripted series, non-scripted reality series, and movies, along with syndicated programming that originally appeared on network television. (Dkt. No. 66 at ¶2.) In 2009, Lifetime was available in New York City to customers of Time Warner Cable ("TWC"), RCN, Cablevision, DirecTV, and DISH, with TWC

being the predominant cable provider. (*Id.* at ¶4.) Lifetime was available to TWC customers as part of all but the least expensive cable packages offered in 2009. (*Id.* at ¶12.)

In 2009, Lifetime began airing the television show "Project Runway." (Dkt. No. 65 at ¶3.) Project Runway, which had aired on the television channel Bravo for its first five seasons and is hosted by Tim Gunn ("Gunn"), is a reality television series in which contestants compete against one another in designing specific articles of clothing. (Dkt. No. 66 at ¶14.) In 2009, Project Runway moved from Bravo to Lifetime, but reruns of the show continued to be aired on Bravo. (*Id.* at ¶¶15&23.) Prior to the sixth season premiere of Project Runway, scheduled to be aired on August 20, 2009, TWC moved Lifetime from its long-held channel position, Channel 12, to Channel 62 (the "Channel Change").

Due to the Channel Change, and Lifetime's fear that it would affect viewership of the Project Runway season premiere, Lifetime considered methods by which to notify its viewers. (Dkt. No. 65 at ¶5.) As methods for notifying customers, Lifetime considered: (i) email; (ii) a "crawl" on TWC channel 12; (iii) television commercials; (iv) an "on hold" message played for customers on TWC's customer service telephone line; (v) a display at TWC retail locations; and (vi) a recorded message. (Dkt. No. 64 Exs. AA, CC, DD.) Finding that some of these methods could not be utilized, Lifetime settled on a recorded voice message by Gunn (the "Message"). (*Id.*; Dkt. No. 65 at ¶5.) Lifetime and Gunn recorded a message saying:

> Time Warner Cable customers, this is Tim Gunn. Do you know that Lifetime has moved to Channel 62? Tune in to Lifetime on Channel 62 tomorrow at 10 p.m. and see me and Heidi Klum in the exciting Season 6 premiere of "Project Runway." The "Project Runway" season premiere tomorrow at 10 p.m., following "The All-Star Challenge." Be there and make it work – only on Lifetime, now on Channel 62.

(Dkt. No. 64 at ¶2.)

In order to execute the voice message broadcast, Lifetime's Vice President for Distribution Marketing, Tracey Barrett Powell ("Powell") contacted Todd Hatley ("Hatley") at a third party company called OnCall Interactive. (Dkt. No. 65 at ¶9.) Lifetime provided OnCall with a list of zip codes for the areas in which TWC customers lived in NYC, which it had obtained from TWC. (Dkt. No. 66 at ¶16; Dkt. No. 65 at ¶¶9-10.) Powell directed OnCall to obtain a list of telephone numbers for cable households located within the provided zip codes. (*Id.*) OnCall, now defunct, informed Lifetime on August 11, 2009, that it had purchased a list of telephone numbers from an unknown third-party vendor. (Dkt. No. 64 Ex. B at 43:25-45:2; Ex. C at 7:7-8:7, 31:2-23; Ex D at 59:16-60:15; Ex. S.) Lifetime was never provided with the list of telephone numbers. (Dkt. No. 64 Ex. D at 61:13-15.) Hatley and Matthew Maday, the former CEO of OnCall, both testified that neither they nor OnCall possessed a copy of the list of telephone numbers that was used in conjunction with the Telephone Message, and they did not recall the vendor from whom the list of numbers was purchased. (Dkt. No. 64 Ex. B at 7:13-9:17, 14:18-15:10, 22:20-25, 28:24-30:19, 32:14-25, 43:25-45:2, 63:16-65:15; Ex. C at 7:7-9:19, 31:2-23.)

In 2009, Leyse shared an apartment (the "Apartment") with Genevieve Dutriaux ("Dutriaux") in New York City, in whose name the Apartment was leased. (Dkt. No. 64 Ex. 42:2-43:3, 50:7-10.) The telephone service in the Apartment was also in Dutriaux's name. Leyse routinely checked the voicemail for Dutriaux's telephone number, and has testified, without supporting documentary evidence, that he paid the telephone bill "most of the time." (*Id.* Ex. A at 56:7-19, Ex. I at 4-5.) Leyse provided a personal cell phone number in connection with work. (*Id.* Ex. A at 48:16-24.) Sometime in 2009, estimated by Leyse to be in July, Leyse heard the Message on Dutriaux's answering machine or voicemail. (*Id.* Ex. A at 53:4-56:6.)

Leyse played the Message for his counsel (for whom he had previously worked as an investigator of TCPA violations), who recorded it. (*Id.* Ex. A at 27:10-25, 58:9-14.) Four years later, on August 16, 2013, Leyse filed the instant suit.

LEGAL STANDARD

Under the well-established summary judgment standard, a "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In deciding the motion, the court must "resolve all ambiguities, and credit all factual inferences that could rationally be drawn, in favor of the party opposing summary judgment". *Roe v. City of Waterbury*, 542 F.3d 31, 35 (2d Cir. 2008). The court should also "eschew credibility assessments". *Amnesty Am. v. Town of West Hartford*, 361 F.3d. 113, 122 (2d. Cir. 2004). However, "[t]he mere existence of a scintilla of evidence in support of the [non-moving] party's position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]". *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

The TCPA prohibits any person from "initiat[ing] any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B)". 47 U.S.C. § 227(b)(1)(B). The exceptions are for: (i) calls that are not made for a commercial purpose; and (ii) such classes or categories of calls made for commercial purposes as the Commission determines—(I) will not adversely affect the privacy rights that this section is intended to protect; and (II) do not include the transmission of any unsolicited advertisement". *Id.* § 227(b)(2)(B). The TCPA creates a private right of action for affected consumers, and allows

them to recover the greater of their actual monetary loss or $500 for each violation. *Id.* § 227(b)(3). It also allows the district court to increase the award up to treble statutory damages if it finds the defendant's violation was willful or knowing. *Id.*

Under Rule 23, the prerequisites for maintaining a class action are numerosity, commonality, typicality, and adequacy of representation. Fed R. Civ. P. 23(a). Once these criteria are satisfied, a plaintiff must meet at least one of the criteria of Rule 23(b). Rule 23(b)(3), the applicable subsection here, requires a showing "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). The proposed class also must be ascertainable. *See Brecher v. Rep. of Argentina*, 2015 WL 5438797 at *2 (2d Cir. Sept. 16, 2015); *see also In re Init. Pub. Offerings Secs. Litig.*, 471 F.3d 24, 30, 44-45 (2d Cir. 2006). "[T]he touchstone of ascertainability is whether the class is 'sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member.' 7A Charles Alan Wright & Arther R. Miller et al., Federal Practice & Procedure § 1760 (3d ed. 1998); *see also Weiner v. Snapple Bev. Corp.*, No. 07 Civ. 8742 (DLC), 2010 WL 3119452, at *12 (S.D.N.Y. Aug. 5, 2010) (a class must be 'readily identifiable, such that the court can determine who is in the class and, thus, bound by the ruling' (internal quotation marks omitted))." *Brecher*, 2015 WL 5438797 at *2.

DISCUSSION

To make out a claim under the TCPA, Leyse must show that (1) Lifetime called him as a "called party" on a residential telephone line; (2) using an artificial or pre-recorded voice; (3) without consent. *See* 47 U.S.C. § 227(b)(1)(B). There is no genuine dispute that

Lifetime called the residential phone line at the address where Leyse resided. However, Defendant argues that: (i) Leyse does not have statutory standing as a "called party"; (ii) Leyse does not have Article III standing; (iii) the telephone message left was not for a commercial purpose and is exempt from the TCPA; (iv) the constitutional avoidance doctrine precludes deference to the FCC's rulings; and (v) the complaint should be dismissed or stayed pursuant to the primary jurisdiction doctrine.

I. Statutory Standing.

Defendant argues that Leyse is not a "called party" under the TCPA, and therefore does not have standing to bring a claim under the TCPA.

On July 15, 2015, the Federal Communications Commission ("FCC") issued a Declaratory Ruling and Order (the "Ruling"), clarifying issues raised through litigation of TCPA issues. *See* FCC 15-72. In the Ruling, the FCC found that "the 'called party' [under the TCPA] is the subscriber, *i.e.*, the consumer assigned the telephone number dialed and billed for the call, or the non-subscriber customary user of a telephone number included in a family or business calling plan". *Id.* at ¶ 73. The FCC went on to explain that it "[found] it reasonable to include in our interpretation of 'called party' individuals who might not be the subscriber, but who, due to their relationship to the subscriber, are the number's customary user and can provide prior express consent for the call". *Id.* at ¶ 75. Either the current subscriber or non-subscriber customary user of the phone can give consent under the TCPA. *Id.* at ¶ 72.

While only "called parties" under the statute have standing to bring suit under the TCPA, I find that, on summary judgment, Defendant has not shown that Leyse was not a "non-subscriber customary user" of the telephone number which Lifetime called with the prerecorded voice to leave the message. Leyse testified that he lived at the apartment with that phone line for

13 years, and that he regularly paid the bill for the telephone line, although he was unable to produce any records confirming that testimony. (*See* Leyse Tr. 43:16-18; 56:12-23.) Construing all facts in the light most favorable to Plaintiff, as I must on a summary judgment motion, I hold that Plaintiff is a called party under the TCPA, and therefore has statutory standing to bring the claim.

An issue not fully addressed in the motion, which remains an issue of fact for trial, is whether Plaintiff's roommate gave consent for the call, which would preclude Plaintiff's recovery under the TCPA.

II. Article III Standing.

Defendant also argues that Plaintiff lacks Article III standing to bring a claim. As I recently held in *King v. Time Warner Cable Inc.*, the TCPA creates a cognizable statutory right under Article III. 14-cv-2018 Dkt. No. 33 at pp. 12-13 (S.D.N.Y. July 7, 2015). Plaintiff's complaint alleges violations of that right, which entitles him to bring suit for the inconvenience of receiving unsolicited prerecorded calls. *See id.*

III. Exemption from the TCPA, Constitutional Avoidance & Primary Jurisdiction.

Lifetime goes to great lengths to argue that the telephone message was not made for a commercial purpose and is exempt from the TCPA. (*See* Dkt. No. 63 at pp. 14-37.) As Lifetime admits, however, the FCC has ruled twice that a promotion for programming provided by a paid-for service is deemed a commercial advertisement that is barred under the statute. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 68 Fed. Reg. 44144, 44163 (F.R. July 25, 2003); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 70 Fed. Reg. 19330, 19335 (F.R. Apr.13, 2005). That ruling is reasonable and appropriate, and I accept it. Lifetime's arguments that this Court should ignore

those rulings, throw them out on First Amendment grounds, or stay this case until Lifetime seeks reconsideration of them, are not persuasive.

I note that Lifetime states in its motion for summary judgment, as it did previously in the motion to dismiss it filed October 31, 2013, "although Lifetime has not yet submitted to the FCC a petition seeking review of the 2003 and 2005 Reports and Orders and the 2003 and 2005 Final Rules as applied to cable programming, it is fully prepared to do so should this Court apply the primary jurisdiction doctrine and dismiss or stay this case." (Dkt. No. 63 at 42; Dkt. No. 8 at 30.) Nothing in this Order should be construed to prevent Lifetime from pursuing that avenue.

IV. Class Certification.

Leyse moves to certify a class of "all persons to whose residential telephone lines Defendant, Lifetime Entertainment Services, LLC, or a third party acting on its behalf initiated, in August 2009, a telephone call using a prerecorded voice to deliver the following message: …". (Dkt. No. 69 at 1.) As the parties are not in possession of a list of the 450,000 phone numbers which Lifetime, or an entity on its behalf, allegedly called in August 2009, Leyse's motion proposes that notification by publication in "New York city newspapers would likely be the most appropriate location, as well as Lifetime's website". (Dkt. No. 83 at 3 n.1.)

Leyse's proposed class fails to meet the ascertainability requirement of Fed. R. Civ. P. 23(b). There is no copy of the list of called numbers that the parties have been able to discover, and the facts concerning calls were allegedly made over a two day period more than six years ago make it unlikely that such a list will be discovered. Since I am unable to determine if any particular individual is a member of Leyse's proposed class, the class is unascertainable, and therefore I deny the motion. *See Brecher*, 2015 WL 5438797 at *2.

CONCLUSION

The motions for summary judgment and for class certification are DENIED. The case shall proceed on the single violation of the TCPA alleged by Leyse to the residential line at his apartment. The oral argument scheduled for September 24, 2015, is hereby CANCELLED. The parties shall appear for a status conference on Friday, October 9, 2015, at 10:00 a.m. to set a trial schedule. The clerks shall mark the motions (Dkt. Nos. 62 & 69) terminated.

SO ORDERED.

Dated: September 22, 2015
New York, New York

ALVIN K. HELLERSTEIN
United States District Judge

Exhibit "J" to the Declaration of Todd C. Bank

Letter From Former FCC General Counsel Samuel L. Feder to the Acting Clerk of the Court of Appeals for the Second Circuit, dated April 11, 2007, in Connection with *Leyse v. Clear Channel Broadcasting Inc.* (2d Cir. No. 06-0152-cv), Which Was Submitted in Support of the Motion for Summary Judgment by Lifetime Entertainment Services, LLC, in *Leyse v. Lifetime Entertainment Services, LLC*, No. 1:13-cv-05794-AKH (S.D.N.Y.)

Schneier Declaration

Exhibit J

Federal Communications Commission
Washington, D.C. 20554

April 11, 2007

Mr. Thomas Asreen
Acting Clerk of Court
United States Court of Appeals
for the Second Circuit
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, New York, 10007

Re: *Leyse v. Clear Channel Broadcasting, Inc.*, No. 06-0152-cv

Dear Mr. Asreen:

The Federal Communications Commission respectfully submits this response to the Court's letter of February 6, 2007, asking for the agency's views on several questions that have arisen in the above-captioned case under the Telephone Consumer Protection Act (TCPA) and the Commission's implementing rules and orders.

BACKGROUND

1. TCPA And Its Exceptions.

The Telephone Consumer Protection Act of 1991, Pub. L. 102-243, 105 Stat. 2394, codified as section 227 of the Communications Act, 47 U.S.C. § 227, regulates the use of the telephone system for marketing goods and services. Congress found that telemarketing had grown substantially over the several years prior to 1991 and that calls seeking to sell products and services "can be an intrusive invasion of privacy" as well as a potential risk to public safety. TCPA §§ 2(4), 2(5), 105 Stat. at 2394.[1] The TCPA was intended to regulate the use of telemarketing, particularly calls made using automatic dialers and prerecorded messages.

Congress accordingly prohibited several especially problematic uses of automatic telephone dialing equipment and prerecorded messages. Congress declared it unlawful to use those technologies to make, without prior consent, any non-emergency call to 911 lines and similar public safety numbers; to hotel, hospital, and nursing home rooms; and to wireless pagers and cell phones. 47 U.S.C. § 227(b)(1)(A). Congress also banned most unsolicited advertisements transmitted by means of a telephone facsimile machine. 47 U.S.C. § 227(b)(1)(C). In addition, the TCPA directed the Commission to undertake a rulemaking to consider other mechanisms for protecting telephone subscribers' privacy, including "do-not-call" databases. 47 U.S.C. §§ 227(c)(1) – (4).

[1] Congress's findings are not codified in the Communications Act; the entire TCPA is reprinted at 7 FCC Rcd 2744 *et seq.*

At the same time, however, Congress recognized that "privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices." TCPA § 2(9). Congress realized that the FCC "should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy, or for noncommercial calls, consistent with the free speech protections embodied in the First Amendment." TCPA §2(13). Thus, with respect to telemarketing calls placed to residential lines, Congress declared it unlawful to "initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, **unless the call is ... exempted by rule or order by the Commission.**" 47 U.S.C. § 227(b)(1)(B) (emphasis added). Congress concomitantly empowered the Commission to exempt from the general prohibition on calls to residential lines "such classes or categories of calls made for commercial purposes as the Commission determines (I) will not adversely affect the privacy rights that this section is intended to protect; and (II) do not include the transmission of any unsolicited advertisement." 47 U.S.C. § 227(b)(2)(B)(ii). Congress defined "unsolicited advertisement" to mean "any material advertising the commercial availability or quality of any property, goods, or services." 47 U.S.C. § 227(a)(5).

The Commission undertook a rulemaking proceeding to implement TCPA in April 1992. In the Notice of Proposed Rulemaking, the Commission proposed to exempt calls made by tax exempt non-profit organizations on the ground that such calls "are not seeking to make a profit on the sale of goods to the called party in a way that the TCPA was attempting to restrict." *TCPA NPRM*, 7 FCC Rcd 2736, 2737 ¶12 (1992). Similarly, after noting that "[s]ome messages, albeit commercial in nature, do not seek to sell a product or service and do not tread heavily upon privacy concerns," the Commission proposed "to exempt by rule from the prohibitions of the statute commercial calls that do not include the transmission of any unsolicited advertisement." *Id.* at 2737 ¶11.

In an ensuing rulemaking order, the Commission exercised its authority under § 227(b)(2)(B) to adopt a rule providing an exemption from the general ban on unsolicited calls to residential numbers using automatic dialers or prerecorded or artificial voices for calls that are "made for a commercial purpose, but d[o] not include the transmission of any unsolicited advertisement." *TCPA Order*, 7 FCC Rcd 8752, 8791 (setting forth new text of 47 C.F.R. § 64.1200(c)(2) (1992)). The Commission promulgated a definition of "unsolicited advertisement" identical to the statutory definition. 47 C.F.R. § 64.1200(f)(5). Under those rules, a telemarketer is permitted to make calls using automatic dialers and prerecorded messages as long as the call does not "advertis[e] the commercial availability or quality of any property, goods, or services." *Ibid.*

In support of that rule, the Commission noted that "the TCPA seeks primarily to protect subscribers from unrestricted commercial telemarketing activities." 7 FCC Rcd at 8773 ¶40. The legislative history of the statute "indicates that commercial calls have by far produced the greatest number of complaints about unwanted calls. Moreover, no evidence has been presented in this proceeding to show that non-commercial calls [a term

the Commission used to include all calls that did not present unsolicited advertising] represent as serious a concern for telephone subscribers as unsolicited commercial calls." *Id.* at 8773-8774 ¶40. The Commission's exemption of calls that did not present unsolicited advertisements was thus based on its determination that such calls did not adversely affect the privacy rights TCPA was intended to protect.

2. Calls Made by Radio and Television Broadcasters.

In April 2000, a member of the public, Robert Biggerstaff, asked the FCC to clarify the Commission's exemption as it applied to prerecorded messages delivered by television and radio stations. Request of Robert Biggerstaff for Clarification, filed April 21, 2000 (JA 45). In support of his request, Mr. Biggerstaff noted that "[s]ome television and radio stations are using recorded messages to solicit consumers to tune into their broadcasts." *Id.* at 1 (JA 45). He contended further that "radio and TV stations are commercial entertainment 'services' and make money from the viewers – even if the consumer is not paying the station directly for the 'service,'" and that "viewers receive advertising when they tune in." *Id.* at 1-2 (JA 45-46).

The FCC addressed Mr. Biggerstaff's request (along with many other matters) in a new rulemaking proceeding undertaken in 2002. *2002 TCPA NPRM*, 17 FCC Rcd 17459 (2002). Although the proceeding was devoted largely to issues surrounding implementation of a national do-not-call list, the Commission also asked for public comment on issues related to the use of "prerecorded messages sent by radio stations or television broadcasters that encourage telephone subscribers to tune in at a particular time for a chance to win a prize or some similar opportunity." *Id.* at 17478 ¶32. The Commission asked, "what rules might we adopt to appropriately balance consumers' interest in restricting unsolicited advertising with commercial freedoms of speech?" *Id.* at 17479 ¶32.

Commenters fell into two camps. A number of commenters, including litigants and attorneys for litigants in TCPA cases, expressed the views that calls from broadcasters are inherently commercial because such calls are intended to increase the station's audience to become more attractive to advertisers. *See 2003 TCPA Order*, 18 FCC Rcd 14014, 14101 n.498 (2003) (summarizing comments). For example, one commenter argued that calls "need not offer something for sale to nonetheless still have advertised the commercial availability or quality of a product or service," Comments of Michael C. Worsham at 9 (filed Dec. 9, 2002) (available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513396734).

Broadcasters took the opposite tack. The National Association of Broadcasters (NAB) argued that "free over-the-air radio and television broadcasts are not consumer products or services that are bought and sold in commercial transactions. Instead, over-the-air radio and television broadcasts are sources of news, information and entertainment programming that are by federal mandate available for free to every person within a station's listening or viewing area." NAB Comments at 5 (filed Dec. 9, 2002) (available at

http://gullfoss2.fcc.gov/prod/ecfs/ retrieve.cgi?native_or_pdf=pdf&id_ document=6513396560). Thus, according to NAB, broadcast programming is "not 'commercially' available to listeners and viewers," and therefore "concepts of 'commercial' availability or quality simply have no applicability to the programming that broadcasters transmit over the public airwaves." *Id.* at 13. As such, "broadcast audience invitation calls, which do not seek to sell a product or service, are not advertisements." *Id.* at 11. *See also* Comments of The Broadcast Team, Inc., filed Dec. 6, 2002) (available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_ document=6513398025).

In the ensuing *2003 TCPA Order*, the Commission agreed with the NAB. The agency noted that the rules promulgated in the original rulemaking "exempt from the prohibition [on prerecorded voice calls to residential telephone lines] calls that are made for a commercial purpose but do not include any unsolicited advertisement." *2003 TCPA Order*, 18 FCC Rcd at 14100 ¶145 (JA 25). Because broadcaster calls did not advertise the commercial availability or quality of a product or service, they did not include an unsolicited advertisement and thus fell within the existing exemption from the general ban. Moreover, the record compiled pursuant to the *2002 TCPA NPRM* showed that calls that encouraged tuning in at a particular time for a chance to win a prize "do not at this time warrant the adoption of new rules. Few commenters … described either receiving such messages or that they were particularly problematic," *2003 TCPA Order*, 18 FCC Rcd at 14100-14101 ¶145 (JA 25). Indeed, the Commission noted, comments filed by the New York State Consumer Protection Board indicated that "NYCPB has not received any complaints" about broadcaster calls. Comments of NYCPB at 13 (filed Nov. 22, 2002) (available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id _document=6513397016), cited at 18 FCC Rcd at n.497 (JA 27). The Commission accordingly concluded "that if the purpose of the message is merely to invite a consumer to listen to or view a broadcast, such message is permitted under the current rules as a commercial call that 'does not include the transmission of any unsolicited advertisement,'" *id.* at 14101 ¶145 (JA 25), and would be exempt from the general ban.

For the same reasons, the Commission found that prerecorded radio station calls were consistent as well with its revised rule, which prohibits calls to any residential telephone number using an artificial or prerecorded voice "unless the call … [i]s made for a commercial purpose but does not include or introduce an unsolicited advertisement or constitute a telephone solicitation." 47 C.F.R. § 64.1200(a)(2)(iii) (2003). "Telephone solicitation" is defined by the statute to mean a call made without consent "for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services." 47 U.S.C. § 227(a)(3). The Commission found that broadcaster calls are not telephone solicitations for the same reason that they are not commercial advertisements.

The Commission distinguished calls placed by over-the-air broadcasters – whose service is free of charge to the listener – from similar calls placed by a paid-for service, such as satellite or cable television. Prerecorded messages "that encourage consumers to listen to or watch programming … for which consumers must pay … would be considered

advertisements for purposes of our rules." 18 FCC Rcd at 14101 n.499. The Commission also distinguished radio and television station calls from calls "about purported 'free offers'" or ... calls that appear only to give information "but are motivated in part by the desire to ultimately sell additional goods or services." *2003 TCPA Order*, 18 FCC Rcd at 14098 ¶¶141, 142. Determining whether a call is prohibited "should turn, not on the caller's characterization of the call, but on the purpose of the message. ... If the call is intended to offer property, goods or services for sale either during the call, or in the future (such as in response to a message that provides a toll-free number), that call is an advertisement." *Ibid.*

Applying those principles to broadcaster calls, the Commission determined that "messages [from broadcasters] that are part of an overall marketing campaign to encourage the purchase of goods or services or that describe the commercial availability or quality of any goods or services, are advertisements." *Id.* at 14101 ¶145. In other words, if a broadcaster call were combined with a promotion for a commercially available good or service (including paid programming), it would be prohibited, but a call restricted only to a free over-the-air broadcast station's programming is not prohibited.

No party petitioned for judicial review of the broadcaster calls portion of the *2003 TCPA Order*. One party, Mr. Biggerstaff, who had first raised the issue, asked the Commission to reconsider its decision. He argued that radio and television are just "advertisement delivery service[s]" that are no different from other commercial services and should be treated no differently. Petition for Reconsideration of Robert Biggerstaff, filed August 22, 2003 at 4-5 (JA 53-54). The petition did not, however, provide any evidence that broadcaster calls currently presented a significant intrusion on privacy.

In the *2005 TCPA Reconsideration Order*, 20 FCC Rcd 3788, 3805-3806 (2005), the Commission rejected Mr. Biggerstaff's argument and affirmed its original position. The Commission reiterated its central finding from the original order: "if the purpose of the message is merely to invite a consumer to listen to or view a broadcast, such message is permitted under the rules as a commercial call that 'does not include or introduce an unsolicited advertisement or constitute a telephone solicitation.'" *Id.* at 3805 ¶42 (JA 35-36). The Commission also again contrasted calls from over-the-air broadcasters with calls from providers of paid programming, which would be considered advertisements because they describe the *commercial* availability or quality of a service. *Ibid.* The Commission thus "decline[d] to reverse [its] conclusion regarding radio station and television broadcaster messages." *Id.* at 3806 ¶44 (JA 36). No party sought judicial review of this aspect of the Order.

3. The Present Case.

This case presents a suit against a radio broadcaster under the TCPA and the Commission's implementing rules and orders. Plaintiff, who seeks to represent both himself and a class of similarly situated people, received a prerecorded telephone message on his residential telephone line from a local radio station. The message said:

> Hi, this is Al "Bernie" Bernstein from 106.7 Lite FM. In case your favorite station went away, I want to take just a minute to remind you about the best variety of yesterday and today at 106.7. Motown, classic 70s from James Taylor, Elton, and Carole King; it's all here. Each weekday, we kick off the workday with an hour of continuous, commercial-free music. This week, when the music stops at 9:20, be the tenth caller at 1-800-222-1067. Tell us the name of the Motown song we played during that hour, and you'll win one thousand dollars. Easy money. And the best variety from 106.7 Lite FM.

Plaintiff claimed that the call violated TCPA and the Commission's rule implementing the statute. Cmplt. ¶¶ 14, 47 (JA 5, 9-10).

The district court dismissed the complaint for failure to state a claim on which relief could be granted. The court found that in the *2003 TCPA Order* the Commission "exempted from § 227 the type of prerecorded call at issue here as neither an unsolicited advertisement nor a telephone solicitation." JA 79. The court deferred to the FCC's determination under *Chevron USA, Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), and dismissed the case. This appeal followed.

DISCUSSION

The Court has asked whether under the Commission's TCPA Orders "a prerecorded telephone message that contains both an invitation to tune into a free radio broadcast at a particular time in order to win a prize and a general promotion for the radio station violates" the TCPA, as interpreted by the Commission. As explained below, the Commission's Orders make clear that a hybrid call that both announces a contest and contains a general promotion for the station is permitted under the Commission's rules. Such a call therefore is not actionable under the TCPA.

The Court has also asked the Commission to reconcile its position with the statute's language and legislative history and to explain why the rule is not arbitrary and capricious. We believe that the Commission's orders are consistent with the TCPA and are otherwise reasonable, but established legal doctrine prohibits this Court from reviewing the Commission's TCPA Orders by way of a collateral attack in a suit between private parties. Congress has specified that judicial review of FCC decisions of the sort at issue here may take place exclusively through the process set forth in the Hobbs Act, 28 U.S.C. § 2341 *et seq.*, and under that process, FCC orders may not be collaterally attacked in separate litigation.

A. The Commission's TCPA Orders Adopted The "Broad Rule."

The prerecorded message at issue in this case combines an invitation to listen to a particular broadcast in order to win a prize with a general promotion for the radio station. The Court has asked whether in the *2003 TCPA Order* the FCC intended to exempt from

TCPA restrictions only messages that are limited to particular broadcasts that offer prizes (what the Court termed the "Narrow Rule") or whether the exemption includes general promotional calls as well (what the Court termed the "Broad Rule"). As explained below, the FCC adopted the Broad Rule.

The Commission's rules exempt from the TCPA's restrictions commercial messages that do not contain an "unsolicited advertisement" or a "telephone solicitation." 47 C.F.R. § 64.1200 (1993); 47 C.F.R. § 64.1200(a)(2)(c) (2003). The *2003 TCPA Order* concludes that "if the purpose of the message is merely to invite a consumer to listen to or view a broadcast, such message is permitted" under both the original rule and the amended rule. 18 FCC Rcd at 14101 ¶145 (JA 25). Examined in its full context and in light of the reasoning behind the Commission's conclusion, *2003 TCPA Order* makes clear that neither telephone messages containing general promotional announcements for broadcast stations nor messages inviting the recipient to listen to specific broadcasts are "unsolicited advertisements." Both are thus permitted under the rules.

At the outset, the parties to the Commission's rulemaking proceeding framed the issue broadly. The Biggerstaff petition for clarification, which placed the issue before the Commission, argued that "radio and TV stations are commercial entertainment 'services' and make money from the viewers – even if the consumer is not paying the station directly for the 'service.'" Biggerstaff Petition at 1-2 (JA 45-46). "In addition," Mr. Biggerstaff observed, "the viewers receive advertising when they tune in." *Id.* The petition thus was not limited to the narrow question of contest advertisements, but addressed the broader issue of whether *any* promotional message from a radio or television station could be exempted from TCPA restrictions on the ground that it is not a "commercial advertisement."

The comments submitted by NAB in response to the *2002 TCPA NPRM* likewise addressed that broader issue. NAB argued that because broadcast programming is not commercially available, "concepts of 'commercial' availability or quality simply have no applicability" to such programming. NAB Comments at 13. Viewed in that way, NAB asserted, promotional messages for broadcast stations cannot be "unsolicited advertisements" as defined – and prohibited – by Congress in the TCPA. Instead, such messages fall within the Commission's statutory authority to exempt commercial calls from TCPA restrictions.

Thus, the issue presented by the parties posed the question whether *any* promotional message for radio or television programming could be characterized as an unsolicited advertisement. The parties to the rulemaking proceeding seemingly recognized that, with respect to the statutory definition of "unsolicited advertisement," there is no difference between a promotion for a specific contest and one for the station in general. If radio and television programming is not a commercially available product, a message promoting it does not describe the "commercial availability or quality" of "goods or services" and cannot be an "unsolicited advertisement" as defined by Congress, whether or not the message is limited to a particular broadcast.

The Commission's reasoning followed the analytical framework established by the parties. The Commission's conclusion turned entirely on the idea that over-the-air broadcasts inherently are not commercial. Although the Commission did not state explicitly why it held that broadcaster calls are not "commercial advertisements," its reasoning is clear from the pointed contrast the Commission drew between over-the-air programming and paid-for programming such as cable and satellite services. Immediately after declaring that broadcaster calls were exempt from restriction, the Commission warned that telephone messages "that encourage consumers to listen to or watch programming, including programming that is retransmitted broadcast programming **for which consumers must pay** (*e.g.*, cable, digital satellite, etc.), would be considered advertisements for purposes of our rules." 18 FCC Rcd 14101 n.499 (emphasis added) (JA 26, 27). The Commission then "reiterate[d] that messages that are part of an overall marketing campaign to encourage the purchase of goods or services or that describe the commercial availability or quality of any goods or services are 'advertisements' as defined by the TCPA." *Id.* at 14101 ¶145 (JA 26). The *2005 TCPA Reconsideration Order* repeated that rationale to justify retention of the new rule (and indeed, it moved the discussion of paid-for programming from a footnote into the text). 20 FCC Rcd at 3805 ¶42 (JA 36). The reconsideration order also reiterated the Commission's previous statement that messages from broadcasters that are "part of an overall marketing campaign to encourage the purchase of goods or services or that describe the commercial availability or quality of any goods or services, are advertisements," *2005 TCPA Reconsideration Order*, 20 FCC Rcd at 3805 ¶42 (JA 36), citing *2003 TCPA Order*, 18 FCC Rcd at 14101 ¶145 (JA 25-26).

The distinction between over-the-air broadcast and a paid-for service thus was the linchpin of the Commission's decision. And it is the only rationale that explains why the Commission treated differently two telephone messages concerning the same programming: a telemarketing message that promotes a free broadcast show is deemed not to address the commercial availability or quality of the programming (and is within the Commission's statutory discretion to exempt it from TCPA restrictions), but a promotion for programming – even the very same programming – provided by a paid-for service is deemed a commercial advertisement that is barred under the statute. Moreover, although the Commission initiated the rulemaking by inviting comment on prerecorded messages encouraging telephone subscribers "to tune in at a particular time for a chance to win a prize or some similar opportunity," 17 FCC Rcd at 17478 ¶32, the Commission ultimately did not determine that promotional messages for broadcast contests or for specific programs have any special characteristics that distinguish them from general promotions for the station. Rather, it relied solely on the distinction between free and paid-for methods of delivery. In light of that rationale, it follows directly that the exemption covers both specific and general promotions for broadcast programming provided without charge to the listener.

That leaves the question whether the Commission exercised its statutory discretion to exempt from TCPA restrictions hybrid calls of the sort at issue here. Again, we believe that it did. In the initial *TCPA Order*, the Commission broadly exempted *all* calls that are "made for a commercial purpose but d[o] not include the transmission of any unsolicited

advertisement." 7 FCC Rcd at 8790-9791; 47 C.F.R. § 64.1200 (1993). That rule, as the Commission held in the *2003 TCPA Order*, 18 FCC Rcd at 14100 (JA 25), covers broadcaster calls on its face. The revised rule, promulgated in 2003, was the same as applied to broadcaster calls. *Ibid.* The Commission adopted that rule on the basis of its finding that commercial messages that "do not seek to sell a product or service … do not tread heavily upon privacy concerns." *TCPA NPRM*, 7 FCC Rcd at 2737. Nothing in the 2003 TCPA rulemaking proceeding changed that analysis. Quite to the contrary, the administrative record ratified the Commission's original approach: the New York State Consumer Protection Board stated that it had encountered no complaints regarding radio promotional calls, and no commenter provided evidence that non-program-specific promotional calls from broadcast stations presented a serious harm to privacy interests.

The Commission's order states that "if the purpose of the message is merely to invite a consumer to listen to or view a broadcast, such message is permitted under the current rules." 18 FCC Rcd at 14101 (JA 25). The "merely" limitation in the Commission's formulation serves to distinguish telephone messages that promote only programming from those calls (which would be prohibited) that promote some other good or service in addition to the programming. In short, under the Commission's rules, a broadcaster is allowed to place telephone calls that combine a general promotional announcement with an invitation to listen to a particular program – the "Broad Rule" identified by the Court.[2]

B. The 2003 TCPA Order Is Not Subject To Collateral Attack In This Proceeding.

The foregoing discussion demonstrates that the district court was correct when it held that the complaint failed to state a claim on which relief could be granted because the telephone message at issue was permissible under the Commission's rules. The Court has also asked whether the FCC's determinations under the TCPA properly interpret the statute or are otherwise arbitrary and capricious. We believe the orders to be a lawful exercise of the Commission's broad authority under the TCPA to exempt commercial calls from the statute's restrictions. That said, the law is clear that the Commission's TCPA Orders are not subject to collateral attack in this lawsuit. As we explain below, district courts may not review FCC orders, and appellate courts may not review FCC orders on appeal from a district court judgment. Rather, Congress has set forth an exclusive mechanism for judicial review of FCC orders of the type at issue in this case that requires a petition for review to be filed directly in the court of appeals within 60 days of publication of the agency order. That mechanism precludes review here, and the FCC's interpretation of the TCPA must be regarded as binding law for purposes of this litigation.

---

[2] If the Court were to disagree with our interpretation of the TCPA Orders, however, the proper course would be to refer the question to the Commission for the agency to formally resolve the matter under the doctrine of primary jurisdiction. *See Ellis v. Tribune Television Co.*, 443 F.3d 71, 81-83 (2d Cir. 2006).

Challenges to orders of the FCC are governed by section 402 of the Communications Act of 1934, which states that "**[a]ny proceeding** to enjoin, set aside, annul, or suspend **any order** of the Commission under this chapter ... **shall be brought as provided by and in the manner prescribed in** chapter 158 of title 28, United States Code." 47 U.S.C. § 402(a) (emphasis added).[3] Chapter 158, which is known as the Hobbs Act and is codified at 28 U.S.C. §§ 2341 *et seq.*, provides in relevant part that "[t]he court of appeals ... has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of all final orders of the Federal Communications Commission made reviewable by [47 U.S.C. § 402(a)]." 28 U.S.C. § 2342(1). The statute specifies that "[a]ny party aggrieved by the [FCC's] final order may, **within 60 days after its entry**, file a petition to review the order in the court of appeals wherein venue lies." 28 U.S.C. § 2344.

The Communications Act and the Hobbs Act thus specify the precise procedure for obtaining judicial review of FCC orders and vest exclusive jurisdiction in the courts of appeals. "[A] statute which vests jurisdiction in a particular court cuts off original jurisdiction in other courts in all cases covered by that statute." *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984). The "appropriate procedure for obtaining judicial review of the agency's disposition of [regulatory] issues [is] appeal to the Court of Appeals **as provided by statute**." *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984) (emphasis added).

This Court has recognized and applied that principle repeatedly, both with respect to the FCC and in similar contexts involving orders of other federal agencies. For example, the Court held that a bankruptcy court could not enjoin the effects of an FCC order or declare that order to be void. Not only did the Court recognize that "[e]xclusive jurisdiction to review the FCC's regulatory action lies in the courts of appeals," but it held that a litigant may not challenge the validity of an FCC order as a defense to an action against it. Rather, the Court of Appeals' exclusive jurisdiction over FCC action "extends as well to collateral attacks: A defensive attack on [an FCC decision] is as much an evasion of the exclusive jurisdiction of the Court of Appeals as is a preemptive strike by seeking an injunction." Thus, "[t]he jurisdictional statutes leave no opening for the sort of jurisdiction over the FCC that the bankruptcy court seeks to exercise." *In re FCC*, 217 F.3d 125, 139-140 (2d Cir.) (quotation marks and citations omitted), *cert. denied*, 531 U.S. 1029 (2000); *accord In re NextWave Personal Communications*, 200 F.3d 43, 54 (2d Cir. 1999) (because "jurisdiction over claims brought against the FCC in its regulatory capacity lies exclusively in the federal courts of appeals," a district court "lack[s] jurisdiction to decide" cases involving FCC regulatory matters); *see also Nextwave Personal Communications, Inc. v. FCC*, 254 F.3d. 130, 142-49 (D.C. Cir. 2001), *affirmed on other grounds*, 537 U.S. 293 (2003).

---

[3] Judicial review of FCC licensing decisions, of which this case is not one, is governed by 47 U.S.C. § 402(b), which vests exclusive jurisdiction in the D.C. Circuit.

The Court has taken the same approach to other statutory schemes that similarly vest the courts of appeals with exclusive review of agency action. It held that the plain terms of a statute similar to the Hobbs Act "preclude[e] federal district courts from affirming, amending, modifying, or setting aside any part of [the agency's] order." *Merritt v. Shuttle, Inc.*, 245 F.3d 182, 187 (2d Cir. 2001). The Court went on to hold that "statutes ... that vest judicial review of administrative orders exclusively in the courts of appeals also preclude district courts from hearing claims that are 'inescapably intertwined' with review of such orders. A claim is inescapably intertwined in this manner if it alleges that the plaintiff was injured by such an order and that the court of appeals has authority to hear the claim on direct review of the agency order." *Ibid.* (citation omitted).

Merritt relied heavily on the Supreme Court's opinion in *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958), which also construed a statute similar to the Hobbs Act and held that "[i]t can hardly be doubted that Congress, acting within its constitutional powers, may prescribe the procedures and conditions under which, and the courts in which, judicial review of administrative orders may be had. ... So acting, Congress ... prescribed the specific, complete and exclusive mode for judicial review of the Commission's orders." 357 U.S. at 336 (citations omitted). "Hence, upon judicial review of the Commission's order, all objections to the order ... must be made in the Court of Appeals or not at all." *Ibid.* In *Merritt*, this Court "read *City of Tacoma* as holding that [an exclusive review provision] precludes (i) de novo litigation of issues inhering in a controversy over an administrative order, where one party alleges that it was aggrieved by the order, and (ii) all other modes of judicial review of the order." 245 F.3d at 188.

All other federal courts of appeals to have addressed the issue have likewise ruled that the Hobbs Act divests district courts of jurisdiction over FCC orders. *Qwest Corp. v. Public Utils. Comm'n of Colorado*, No. 06-1132 slip op. at 17 n.6 (10th Cir. March 5, 2007); *Vonage Holdings Corp. v. Minnesota* PUC, 394 F.3d 568, 569 (8th Cir. 2004) ("[n]o collateral attacks on the FCC order are permitted" in private party litigation); *United States v. Any & All Radio Station Transmission Equip.*, 207 F.3d 458, 463 (8th Cir. 2000); *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 396-397 (9th Cir. 1996); *Telecommunications Research & Action Center*, 750 F.2d at 75; *George Kabeller, Inc. v. Busey*, 999 F.2d 1417, 1412-1422 (11th Cir. 1993); *Bywater Neighborhood Ass'n v. Tricarico*, 879 F.2d 165, 167 (5th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); *City of Peoria v. General Electric Cablevision Corp.*, 690 F.2d 116, 119 (7th Cir. 1982) (describing challenge to FCC rule in private party district court litigation as having been "brought in the wrong court at the wrong time against the wrong party").

The rule against collateral attacks on FCC orders is reinforced by the structure of the TCPA. As relevant here, the statute permits private parties to collect damages when they receive certain pre-recorded calls, unless that type of call "is exempted by rule or order by the Commission." 47 U.S.C. § 227(b)(3) & (b)(1)(B). Accordingly, the pertinent question in a private case where the Commission has exercised its exemption authority in an arguably relevant way is the scope of the exemption, not its validity. If the call has been "exempted by rule or order by the Commission," that is the end of inquiry.

The district court in this case applied the TCPA Orders to the message at issue and correctly determined that the Commission had exempted such messages. It then deferred to the FCC's interpretation of the TCPA. Plaintiff-appellant spends much of his brief arguing that "[t]he FCC's opinion is not entitled to deference" (Br. 9-12), that the FCC's orders were arbitrary and capricious (Br. 12-15), and that this Court should therefore reverse those orders. But that inquiry is precisely what Congress forbade when it established an exclusive method for judicial review of FCC rulemaking orders. The proper route for judicial review of those orders was a petition for review filed in an appropriate court of appeals within 60 days of the order's publication in the Federal Register. After that time period has elapsed, should any party wish to effect a change in the law, the proper procedure is either to petition the FCC for a declaratory ruling, 47 C.F.R. § 1.2, or to initiate a new rulemaking proceeding, 47 C.F.R. § 1.401. *See ITT*, 466 U.S. at 468 n.5, *City of Peoria*, 690 F.2d at 121. Any resulting order would then be reviewable under the Hobbs Act in the ordinary course. But at this point, and in this lawsuit, the FCC's orders may not be "enjoin[ed], set aside, annul[led], or suspend[ed]." 47 U.S.C. § 402(a). Instead, they must be regarded as binding law.

CONCLUSION

In its TCPA Orders, the Commission adopted the "Broad Rule" exempting messages that contain promotions for both specific programs and for the station in general. The Commission's orders are not subject to review in this proceeding.

Respectfully submitted,

Samuel L. Feder
General Counsel

cc: all parties

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of: Lifetime Entertainment Services, LLC Petition for Declaratory Ruling to Clarify Scope ofRu1e 64.l200(a)(3) or, in the Alternative, for Retroactive Waiver	Proceeding Number: 02-278

COMMENT ON PETITION BY LIFETIME ENTERTAINMENT SERVICES, LLC, FOR DECLARATORY RULING TO CLARIFY THE SCOPE OF RULE 64.1200(a)(3), OR, IN THE ALTERNATIVE, FOR RETROACTIVE WAIVER

TODD C. BANK
119-40 Union Turnpike
Fourth Floor
Kew Gardens, New York 11415
(718) 520-7125

Counsel to Mark Leyse

TABLE OF CONTENTS

Page

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of: Lifetime Entertainment Services, LLC Petition for Declaratory Ruling to Clarify Scope ofRu1e 64.l200(a)(3) or, in the Alternative, for Retroactive Waiver	Docket No.

INTRODUCTION

Mark Leyse ("Leyse"), by the undersigned counsel, submits this comment on the Petition by Lifetime Entertainment Services, LLC ("Lifetime"), for a declaratory ruling to clarify the scope of Rule 64.1200(a)(3), or, in the alternative, for a retroactive waiver.

DISCUSSION

POINT I

LIFETIME ENGAGES IN NUMEROUS FALSE AND MISLEADING ASSERTIONS

Evidently lacking confidence in its legal position, Lifetime offers up a plethora of brazenly false and misleading statements, which pertain both to the factual background of its illegal-robocall campaign and the legal background of the litigation from which Lifetime, having been unsuccessful in that litigation, now desperately seeks to escape (*Leyse, et al. v. Lifetime Entertainment Services, LLC*, No. 1:13-cv-05794-AKH (S.D.N.Y.) (the "*Leyse* Action" or *Leyse*)).

Lifetime states that, "[l]ike Bravo, the Lifetime network was (and still is) included in all New York City Time Warner subscribers' cable packages at no additional charge." Pet. at 2. This is false. In unsuccessfully moving for summary judgment in the *Leyse* Action, Lifetime admitted that "[n]either Bravo nor Lifetime was available to subscribers to the least expensive Time Warner Cable package offered in 2009, but both channels were included in all of the other packages offered by

Time Warner Cable at that time for one applicable Time Warner Cable monthly subscription fee." Lifetime's Statement of Material Facts Not in Dispute in Support of Lifetime's Motion for Summary Judgment, ¶ 31 (a copy of which is annexed as Exhibit "A" to the Declaration of Todd C. Bank).

Lifetime states that, "Lifetime decided to circulate a pre-recorded telephone message intended to reach *only those affected by the change: Time Warner subscribers in New York City*." Pet. at 6 (emphasis added), noting, in a footnote thereto, that, "[w]hile the Lifetime channel was also available in New York City to subscribers of competing cable providers (such as RCN), satellite providers (such as DirecTV service) and the then-nascent television service provided by a telephone company (such as Verizon's FiOS service), in 2009, Time Warner Cable's penetration throughout the city was deeper than theirs." Pet. at 6, n.l4. Even aside from the fact, as set forth above, that not all Time Warner Cable customers received the Bravo and Lifetime channels, the assertion that Lifetime "intended to reach only those affected by the change: Time Warner subscribers in New York City" is a patent lie. In moving for summary judgment in the *Leyse* Action, Lifetime stated that it "reached out to . . . OnCall Interactive, a third-party company, to execute [Lifetime's] voice broadcast [*i.e*, Lifetime's robocalls]," Lifetime's Statement, ¶ 41, and that Lifetime "provided the zip code list obtained from Time Warner Cable to [Todd] Hatley at OnCall Interactive and directed OnCall to obtain an appropriate list of telephone numbers for cable households located within the specified zip codes." *Id.*, ¶ 55. Thus, "OnCall Interactive was responsible for obtaining a list of telephone numbers." *Id.*, ¶ 56. Accordingly, "[o]n August 11, 2009, OnCall Interactive informed Lifetime that it had purchased a list of telephone numbers," *id.*, ¶ 57, but "Lifetime was never provided with the list of telephone numbers," *id.*, ¶ 58 (*accord*, Def. Mem. at 5, n.6); indeed, "Lifetime does not, and did not, know the name of the vendor that OnCall Interactive contacted to purchase the list of telephone numbers." *Id.*, ¶ 60. In fact, "[n]either [of OnCall's two deposition witness] recalls from

whom the list of telephone numbers was purchased." *Id.*, ¶ 56.

As Lifetime's corporate witness explained, the zip codes gave no indication of who, in those zip codes, were Time Warner Cable customers, but instead were merely "ZIP codes *where Time Warner Cable has service*." Transcript of Deposition of Tracy Powell ("Powell Tr."), p.66, lines 19-20 (emphasis added) (a copy of whose relevant portions is annexed as Exhibit "B" to the Declaration of Todd C. Bank). In addition, Ms. Powell stated that she had no idea where the numbers originated from, be it from Time Warner Cable or any other source: "Q: Was it your understanding that the list vendor obtained the telephone numbers from Time Warner? . . . A: I have no knowledge of where the list vendor gets its list." Powell Tr., p.69, lines 12-14, p.70, lines 6-7.

As the foregoing makes clear, Lifetime itself has acknowledged that it never knew a single thing about the telephone numbers being called other than that they were presumably located in zip codes in which Time Warner Cable's service was available. Thus, Lifetime's claim that "the pre-recorded call was expressly addressed to Time Warner [Cable] subscribers who were already receiving 'Project Runway' as part of their 'basic' cable subscription packages," Pet. at 2 (or "explicitly addressed," Pet. at 12), reflects the text of the robocalls but not what Lifetime actually did in making them. Likewise false is Lifetime's claim that "Time Warner provided Lifetime with a list of the 136 Zip codes covering the areas in which its New York City subscribers resided [and] [t]his list was then used to reach the relevant Time Warner subscribers (*and other viewers of 'Project Runway*')." Pet. at 6 (emphasis added) (thus, Lifetime's robocalls were not, even according to Lifetime, directed specifically to Time Warner Cable customers).

Lifetime states that "Leyse also does not dispute that the Call was solely intended to reach existing Time Warner customers who already had access to 'Project Runway.'" Pet. at 7, citing, in a footnote thereto, Schneier Decl. at Ex. A (purportedly attaching excerpts from the deposition of

Mark Leyse in Mr. Leyse's civil action against Lifetime), and note 17, *supra*. Pet. at 7, n.22. However, the Petition includes neither the declaration of Ms. Schneier nor the purported exhibit, nor any of the other exhibits cited throughout the Petition.

Lifetime contends that its robocalls "did [not] provide information about how new customers might sign up," Pet. at 12; *see also id.* at 15 ("[a] prospective Time Warner customer, after hearing the call, had no more information about how to subscribe to the cable operator's services than before."). That, of course, is not true, for a person listening to the message would obviously have learned that one can obtain the Lifetime channel from Time Warner Cable. Likewise, Lifetime's claim that its robocalls were "not (and could not have been) a pretext to sell additional goods or services, as Lifetime does not even sell any goods or services directly to customers," Pet. at 12, n.43 (*see also id.* at 13 ("Lifetime does not sell its programming directly to persons without a cable subscription.")), disregards the point that a business is not free to make robocalls merely because it does not sell its goods or services directly. Indeed, under Lifetime's argument, the manufacturer of virtually every item in a grocery store would be permitted to make robocalls and then claim that such calls were permissible because the manufacturer does not sell its goods directly.

Lifetime's petition includes copies of the declarations of Tracy Barrett Powell and Sara Edwards Hinzman from the Leyse Action. (for the reader's convenience, copies of these declarations are annexed as Exhibits "C" and "D," respectively, to the Declaration of Todd C. Bank).

Ms. Hizman's declaration states:

> Time Warner Cable and Lifetime collaborated on strategies to inform Time Warner Cable customers about the channel change for Lifetime. Some of those strategies were executed by Time Warner Cable and others by Lifetime. As part of that *collaboration*, Lifetime reached out to Barbara Kelly ("Kelly"), Senior Vice President/General Manager at Time Warner Cable, who was at that time in charge of Time Warner Cable for the five boroughs, Westchester and Connecticut. *Kelly provided Lifetime with all of the*

> *zip codes for the areas in which their subscribers lived in New York City*. [Ex. EE.]

Declaration of Sara Edwards Hinzman, ¶ 16 (emphases added; brackets in original). The next paragraph of the declaration states: "Time Warner Cable *knew* Lifetime would use the zip codes in conjunction with a campaign to deliver a pre-recorded telephone message to Time Warner Cable customers. [*See* Exs. Z & AA.]" (emphasis added; brackets in original); *see also* Declaration of Tracy Barrett Powell ("Time Warner Cable provided Lifetime with a list of zip codes which reflected the areas within New York City in which Time Warner Cable provided service, *so that* an appropriate list of telephone numbers for cable households in those zip codes could be secured. [*See* Ex. EE]." Powell Decl., ¶ 8 (emphasis added; brackets in original)).

Lifetime's representations that Time Warner Cable provide the zip codes with the knowledge that Lifetime would use those zip codes to make its robocalls is not only irrelevant, but an outright lie. First, Exhibit "G" is a copy of Time Warner Cable's customer agreement (a copy of which is annexed as Exhibit "E" to the Declaration of Todd C. Bank), which says nothing about zip codes and nothing about Time Warner Cable's authorizing of television networks to make robocalls. Indeed, as discussed below, the agreement makes clear that only Time Warner Cable itself may make robocalls. *See* Point IV, *infra*.

In Exhibit "EE" (a copy of which is annexed as Exhibit "F" to the Declaration of Todd C. Bank), the only reference to telephone calls is in an email from Ms. Powell to Todd Hatley, who was Ms. Powell's contact person at OnCall Interactive, which was the third party that arranged for the robocalls to be made on behalf of Lifetime. *See* Lifetime's Statement, ¶¶ 41, 54, 55; Powell Decl., ¶¶ 9, 10. Thus, Exhibit "EE" does not offer any evidence that Time Warner Cable had knowledge of why the zip codes had been requested, although the absence of a showing by Lifetime that it made the robocalls on behalf of Time Warner Cable would make any argument about Time Warner

Cable's knowledge irrelevant in any event. Moreover, Ms. Powell admitted that she did know whether her colleague who requested the zip codes from Time Warner had told Time Warner why that request was being made. *See* Powell Tr., p.63, line 21 - p.64, line 7.

Exhibit "Z" (a copy of which is annexed as Exhibit "G" to the Declaration of Todd C. Bank) contains copies of emails to which Time Warner Cable was not a party nor even copied on, and do not, in any event, indicate that Time Warner Cable had been informed of Lifetime's decision to make robocalls (one might wonder, of course, why Time Warner Cable, with knowledge of Lifetime's intent to make robocalls, would, rather than supply the telephone numbers to Lifetime, supply zip codes so that Lifetime could hire a third party that could, in turn, obtain telephone numbers from another third party).

Finally, Exhibit "AA" (a copy of which is annexed as Exhibit "H" to the Declaration of Todd C. Bank) is simply an email from a Lifetime employee to a Time Warner Cable employee that refers, among numerous ideas, to the use of prerecorded phone calls. The exhibit contains no response from any Time Warner Cable employee, and thus no indication that Time Warner Cable approved of the making of such calls. Moreover, it remains indisputable that Lifetime had not acted as Time Warner Cable's agent when making the calls (thus, again, showing the irrelevance of Time Warner Cable's customer agreement).

Lifetime states: "Leyse's roommate (Genevieve Dutriaux) was assigned the residential telephone number reached by Lifetime's informational call. The basis for Leyse's lawsuit — for which he has sought class certification — is that he heard Lifetime's 20-second call announcing the 'Project Runway' move as a message on Dutriaux's answering machine or voicemail service." Pet. at 2. As Lifetime knows, however, Lifetime previously argued, unsuccessfully, before the District Court in the *Leyse* Action, that Leyse lacked standing on account of the telephone line having been

in his roommate's name. *See Leyse*, Order denying summary judgment at 6-7 ("*Summary Judgment Order*," a copy of which is annexed as Exhibit "I" to the Declaration of Todd C. Bank).

Lifetime states that, "[f]ollowing the [district] court's *invitation*, Lifetime now seeks relief from the Commission." Pet. at 9 (emphasis added). Here, again, Lifetime seeks to portray itself as a goody-two-shoes actor, when, as Lifetime surely knows, it could have brought its petition at any time, but had hoped to do so upon the District Court's granting of Lifetime's request to apply the doctrine of primary jurisdiction (a request that the District Court rejected, *see Summary Judgment Order* at 7-8). Indeed, the District Court merely recognized the obvious; *i.e.*, that Lifetime had the right to bring its petition, rather than having, as Lifetime states, "invited" Lifetime to do so. As the District Court explained:

> I note that Lifetime states in its motion for summary judgment, as it did previously in the motion to dismiss it filed October 31, 2013, "although Lifetime has not yet submitted to the FCC a petition seeking review of the 2003 and 2005 Reports and Orders and the 2003 and 2005 Final Rules as applied to cable programming, it is fully prepared to do so should this Court apply the primary jurisdiction doctrine and dismiss or stay this case." (Dkt. No. 63 at 42; Dkt. No.8 at 30.) Nothing in this Order should be construed to prevent Lifetime from pursuing that avenue.

Summary Judgment Order at 8.

POINT II

LIFETIME'S ATTACKS ON THE DISTRICT COURT'S DENIAL OF LIFETIME'S MOTION FOR SUMMARY JUDGMENT ARE WITHOUT MERIT

Lifetime complains that "the sole reason Leyse survived summary judgment was the District Court's *overly broad* reading of language in the Commission's precedent and rules." Pet. at 15, n.54 (emphasis added). As Lifetime knows, of course, the District Court simply applied what the Commission had clearly, and repeatedly, stated. As the District Court explained:

> Lifetime goes to great lengths to argue that the telephone

> message was not made for a commercial purpose and is exempt from the TCPA. (*See* Dkt. No. 63 at pp. 14-37.) *As Lifetime admits*, however, the FCC had *ruled twice* that a promotion for programming provided by a paid-for service is deemed a commercial advertisement that is barred under the statute. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 68 Fed. Reg. 44144, 44163 (F.R. July 25, 2003); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 70 Fed. Reg. 19330, 19335 (F.R. Apr.13, 2005).

Summary Judgment Order at 7 (emphases added).

Lifetime similarly complains that "the court focused on a single sentence in the Commission's 2003 Final Rule which stated (without further elaboration) that: '[M]essages that encourage consumers to listen to or watch programming, including programming that is retransmitted broadcast programming for which consumers must pay (e.g., cable, digital satellite, etc.), would be considered advertisements for purposes of our rules.'" Pet. at 16, quoting *Report and Order In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 68 Fed. Reg. 44144, 44163, ¶ 105 (July 3, 2003) ("2003 Report & Order"). First, as shown in the above block quotation, the District Court also referred to the Commission's 2005 reaffirmation of this ruling. Second, the Commission was clear in any event: robocalls like Lifetime's are not exempt from the general prohibition.

Lifetime, admitting that it mischaracterized the scope of the District Court's inquiry, claims that "none of the materials cited by the District Court in the *Leyse* Litigation (including the 2003 Final Rule, 2003 Report and Order, 2005 Report and Order, and opinion of the former FCC General Counsel [the last of which the District Court did not cite]) considered informational calls directed at existing subscribers — the issue here." Pet. at 17. However, the Commission has never suggested that a call concerning a station's paid-for programming is exempt if the recipient already receives the station at issue. Indeed, one who pays to receive a cable station would have to continue to pay

in order to continue to receive it.

Lifetimes claims: "[t]he District Court's reading of language in the Commission's orders not only exposes Lifetime (and others in its position) to costly and burdensome litigation that does not advance the TCPA's purposes, but also disserves the public interest by discouraging cable networks and operators from providing useful and germane information to cable subscribers and viewers of the relevant programming. The Commission should therefore take this opportunity to elucidate that its orders and rules implementing the TCPA do not — and were never intended to — mandate this result," Pet. at 3; *see also id.* at 9 ("[l]awsuits such as the Leyse Litigation threaten to deter cable operators and programmers from using an effective communication tool (telephonic notifications) to keep subscribers and viewers informed of changes to their services and programs."). First, Lifetime surely knows that it is merely pretending to challenge the "[t]he District Court's reading of language in the Commission's orders," whereas, in fact, Lifetime is challenging the orders themselves. Second, how ironic it is that Lifetime argues that its inability to deluge consumers with robocalls is so oppressive when, at the same time, Lifetime points out that Time Warner Cable's customer agreement allows Time Warner Cable to make robocalls (albeit to no avail here for Lifetime, *see* Point IV, *infra*). Clearly, Lifetime could have obtained such permission as well, such as by asking, on its television channel, the channel's viewers to give their permission (which could be done on Lifetime's web site, for example). Of course, the Time Warner Cable agreement could have included, as a term, customers' permission to receive robocalls from the dozens or hundreds of stations that Time Warner Cable carries. In any event, Lifetime's argument ignores the obvious disservice that would occur if every one of the dozens or even hundreds of networks that are carried by a cable-television provider were free to make robocalls to those who receive their channels. If a cable-television subscriber were to give his express permission to receive such calls, that would be

his right, but, for anyone else, the unwanted robocalls could be a nightmare.

POINT III

LIFETIME'S ATTACKS ON THE COMMISSION'S PERFECTLY CLEAR RULINGS ARE WITHOUT MERIT

Lifetime contends that, "regardless of whether a bright-line distinction between telephone calls directed to broadcast viewers as opposed to cable viewers even made sense in 2003, no such distinction makes sense now." Pet. at 17. In support of this contention, Lifetime states that, "[a]s the Second Circuit noted in 2010, relying on data from the Commission, 'cable television is almost as pervasive as broadcast ... and most viewers can alternate between broadcast and non-broadcast channels with a click of their remote control,'" Pet. at 17-18, citing, in footnote 59 thereto, *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 325 (2d Cir. 2010), *vacated and remanded*, 132 S. Ct. 2307 (2012). However, *Fox* addressed a First Amendment challenge to the Commission's rules concerning indecency on broadcast stations, and, as such, does not support the notion that the Commission was required to exempt subscription-television stations from the robocall prohibition.

Apparently recognizing the futility of its argument, Lifetime buries, in a footnote, its contention that, "[p]articularly in light of these present market conditions, perpetuating any such distinction based on the identity of the speaker would also violate the First Amendment." Pet. at 18, n.61. On the contrary, the Commission's distinction does not rest on the identity of the speaker, but on the *type of station*, *i.e.*, available for free versus available only commercially, being promoted.

Lifetime contends that the "distinction [between cable television and broadcast television] is also doubly irrelevant to the fact pattern addressed in this petition for declaratory ruling — *i.e.*, situations in which a cable operator or cable network makes unsolicited and pre-recorded informational calls that are intended to reach only subscribers of the operator who are already entitled to watch the cable programming at issue for no additional charge. In this situation, there is

no reason to believe that the privacy rights protected by the TCPA are any more adversely affected by a call from a cable operator than the identical call from a broadcast." Pet. at 18. However, the distinction that the Commission has repeatedly made between calls pertaining to broadcast stations versus paid-for stations was based upon the Commission's view that the former simply do not meet the definition of "advertisement." *See*, generally, Letter from former FCC General Counsel Samuel L. Feder to the Acting Clerk of the Court of Appeals for the Second Circuit, dated April 11, 2007, in connection with *Leyse v. Clear Channel Broadcasting Inc.* (2d Cir. No. 06-0152-cv) ("Feder Letter," a copy of which is annexed as Exhibit "J" to the Declaration of Todd C. Bank), which Lifetime submitted in support of its motion for summary judgment. This distinction was entirely sensible because the Commission is authorized to exempt calls only if they "will not adversely affect the privacy rights that [the TCPA] is intended to protect *and* do not include the transmission of any unsolicited advertisement." 47 U.S.C. § 227(b)(2)(B)(ii)((I) and (II) (emphasis added). Thus, as reflected in the Commission's repeated explanations, the finding that messages that pertain to programming on subscription-only stations constitute advertisements *required* that such calls not be exempt regardless of whether such calls "adversely affect the privacy rights that [the TCPA] is intended to protect."

Ironically, Lifetime argues that "the single remaining difference — that cable viewers pay for programming while broadcast viewers do not — is irrelevant to the TCPA's purpose of protecting consumer privacy interests." Pet. at 18. However, this "single remaining difference" is the very reason that the Commission exempted broadcast calls but not cable-station calls, as Lifetime is forced to concede. *See* Pet. at 8, n.30, quoting Feder Letter at 8.

Lifetime notes that "[c]able (as opposed to broadcast) television was not even mentioned in the [2002] [N]otice [of Proposed Rulemaking] at all." Pet. at 19. However, not only did the

Commission reaffirm its resulting 2003 Report and Order in the 2005 Final Rule, but even if there were a complaint to be had, it would be that the Commission exempted broadcast-station telephone calls, not that it did *not* exempt cable-station calls.

Lifetime claims that: "[n]or does it make any sense that Lifetime would have sought to increase revenues by touting one particular episode of 'Project Runway' the night before the season premiere (which was when the Call was made). Under those circumstances, it is fanciful to believe that recipients would have had the time, ability or incentive to sign up and become Time Warner subscribers overnight simply so they could watch the show the next day." Pet. at 13. This assertion begs the question of how many days in advance of a program should a cable-television network be permitted to make robocalls. Three days? A week? A month? In any event, common sense defeats Lifetime's point. Under its reasoning, an unsolicited fax that urged recipients to "[s]ee all of the exciting action when the Washington Wizards play the New York Knicks tomorrow night on ESPN" would also be permissible as a "non-advertisement."

Lifetime contends that the Commission should reverse its well settled course because "[n]either the Commission's goals nor the public interest is served by subjecting Lifetime (and potentially other cable networks) to lawsuits from plaintiffs who have suffered no actual harm." Pet. at 4. Thus, in addition to challenging this Commission's orders, Lifetime also critiques the statute itself, for the question of whether the recipients of Lifetime's calls "suffered no actual harm" is the same as with respect to any other robocall.

Finally, Lifetime resorts to taking out of context what this Commission held (ironically, Lifetime falsely accused the District Court of taking the Commission's rulings out of context, *see* Point II, *supra*): "[t]he Commission should clarify that its precedent and rules do not embody the counterintuitive and sweeping rule that *all* pre-recorded messages — even informational ones —

placed by cable networks must be viewed as 'commercial' or 'advertising,'" Pet. at 9 (emphasis added); *see also id.* at 17 (same). Of course, the Commission did not make the "sweeping" finding that Lifetime self-servingly claims it made, and claims so with knowing falseness, for Lifetime itself exposes its own lie. *See* Pet. at 8, n.30.

POINT IV

LIFETIME'S SUGGESTION THAT TIME WARNER CABLE'S CUSTOMER AGREEMENT IS RELEVANT IS FRIVOLOUS

Lifetime states that, "[a]s part of their agreement with Time Warner, the cable operator's customers consent to receive information (including pre-recorded calls) about content distributed by Time Warner," Pet. at 6; *see also* Pet. at 14, n.48 ("[a]lthough Leyse might not have had an established business relationship with Lifetime or with Time Warner Cable, other potential class members who were Time Warner Cable subscribers had an established business relationship with that cable provider. Moreover, pursuant to their subscriber agreements, Time Warner Cable customers consented to receive telephone calls about Time Warner programming."). The agreement to which Lifetime refers (and cites) in this discussion is the Time Warner Cable Residential Services Subscriber Agreement (*see* Bank Decl., Exh. "E"), which does not refer to any entity other than Time Warner Cable, nor does it contain any statement, either directly or by implication, that any of the terms in that agreement are applicable to any other entity, including networks, such as Lifetime's, whose programming is transmitted by Time Warner Cable. The relevant provision of the TWC Agreement states as follows:

> I consent to *TWC* calling the phone numbers I supply to it for any purpose, including the marketing of its current and future Services. I agree that these phone calls may be made using any method, including an automatic dialing system or an artificial or recorded voice. Upon my request, the phone numbers I have previously provided will be removed from *TWC*'s phone marketing list. I can make this request by calling or writing my local *TWC* office and

asking to be placed on *TWC*'s Do Not Call List.

TWC Agreement, ¶ 13(a) (emphases added).

Lifetime, in the *Leyse* Action, neither produced any discovery documents, nor provided any evidence in support of its summary-judgment motion, indicating that Lifetime had acted on behalf of Time Warner Cable with respect to Lifetime's robocalls. Thus, Lifetime's reliance on the TWC Agreement is of no avail.

POINT V

LIFETIME'S RELIANCE UPON CASE LAW IS WITHOUT MERIT

Lifetime erroneously contends that *Sandusky Wellness Center, LLC v. Medco Health Solutions, Inc.*, 788 F.3d 218 (6th Cir. 2015), supports its position. *See* Pet. at 14. In *Sandusky*, the plaintiff was a chiropractic office, and the defendant rendered services to providers of third-party healthcare plans ("plan providers," or what the court referred to as "sponsors"). Typically, the defendant's client was an employer, and a plan's members were the employer's employees. Among the defendant's services was the maintenance of a list, or "formulary," of medicines that are available through a particular healthcare plan. The defendant, in addition to sending those lists to its plan-provider clients in order to assist them in choosing which prescription-drug plans to provide to their members, also sent the lists to medical offices whose patients used a healthcare plan that was provided by one of the defendant's clients, thus enabling a medical office to know which prescription drugs would be paid for by the healthcare plan of a patient who the office was treating.

The plaintiff brought an action based upon two faxes. The court described the first fax as follows:

> Th[e] fax, entitled "Formulary Notification[,]" . . . , informed [the plaintiff] that "[t]he health plans of many of your patients have adopted" [the defendant]'s formulary. The fax asked [the plaintiff] to "consider prescribing plan-preferred drugs" to "help lower medication

> costs for [the plaintiff's] patients," and it listed some of those drugs. It also told [the plaintiff] where [the plaintiff] could find a complete list of the formulary. Other than listing [the defendant]'s name and number, the fax did not promote [the defendant]'s services and did not solicit business from [the plaintiff].

Id. at 220. The second fax, "entitled 'Formulary Update[,]' . . . , informed [the plaintiff] that a certain respiratory[-]drug brand was preferred over another brand, and that using the preferred brand could save patients money." *Id.* at 220-221.

Regarding the two faxes, the court found: "[n]either . . . fax . . . contained pricing, ordering, or other sales information. Nor did either fax ask [the plaintiff], directly or indirectly, to consider purchasing [the defendant]'s services. The undisputed facts in the record instead show that each merely informed [the plaintiff] which drugs its patients might prefer, irrespective of [the defendant]'s financial considerations." *Id.* at 221. Upon these facts, the court detailed its view that the faxes were not advertisements:

> [The faxes] call items (medications) and services ([the defendant]'s formulary) to [the plaintiff]'s attention, yes. But no record evidence shows that they do so because the drugs or [the defendant]'s services are for sale by [the defendant], now or in the future. In fact, the record shows that [the defendant] has no interest whatsoever in soliciting business from [the plaintiff]. And no record evidence shows that the faxes promote the drugs or services in a commercial sense—they're not sent with hopes to make a profit, directly or indirectly, from [the plaintiff] or the others similarly situated. Nor does any record evidence show that [the defendant] hopes to attract clients or customers by sending the faxes. The record instead shows that the faxes list the drugs in a purely informational, non-pecuniary sense: to inform [the plaintiff] what drugs its patients might prefer, based on [the defendant]'s formulary—a paid service already rendered *not to* [*the plaintiff*] *but to* [*the defendant*]*'s clients*. Under the Act's definition, and in everyday speak, these faxes are therefore not advertisements: They lack the commercial components inherent in ads.

Id. at 222 (emphasis added).

A key distinction between the *Sandusky* faxes and Lifetime's robocalls is that, as the court

explained in the above quotation, the recipients of the faxes were not even in a position to pay for anything that the faxes concerned, whether directly or indirectly (such as through another entity). Obviously, that is not the case with respect to Lifetime's robocalls. Thus, Lifetime's attempt to analogize the faxes in *Sandusky* to Lifetime's robocalls is misplaced.

Lifetime notes that, in *Physicians Healthsource, Inc. v. Janssen Pharmaceuticals, Inc.*, No. 12-cv-2132, 2013 WL 486207 (D.N.J. Feb. 6, 2013), the court "specifically held that 'whether the sender will ultimately obtain an ancillary commercial benefit from sending an informational message does not alter this classification' under the TCPA," Pet. at 11, n.2, quoting *Janssen*, 2013 WL 486207 at *4. However, the physicians who received the faxes in *Janssen* were prescribers of the drug whose insurance reclassification the faxes concerned, not would-be purchasers of the drug, and were thus clearly not akin to the recipients of Lifetime's robocalls, but were instead similarly situated to the fax recipients in *Sandusky*.

Finally, Lifetime's reliance upon *Alleman v. Yellowbook*, No. 12-cv-1300, 2013 WL 4782217 (S.D. Ill. Sept. 6, 2013), *see* Pet. at 15, is misplaced. There, the court rejected the plaintiff's claim that a prerecorded call that sought to confirm his receipt of a free yellow-pages telephone book violated the TCPA, reasoning that the defendants "do not even sell products or services to consumers." *Id.* at *3. Indeed, *Alleman* supported its ruling by noting that "the FCC distinguished messages that invite a consumer to listen or view a free broadcast from those that encourage programming for which a consumer must pay (*e.g.* cable, digital satellite, etc.)." *Id.* at *5, citing *Leyse v. Clear Channel Broad., Inc.*, 697 F.3d 360, 366 (6th Cir.2012).

POINT VI

LIFETIME'S REQUEST FOR A WAIVER IS WITHOUT MERIT

Lifetime's request, in the alternative, for a waiver simply refers back to its general arguments, *see* Pet. at 20, and does not provide any reason why the Commission should interfere with the District Court proceedings in the *Leyse* Action.

CONCLUSION

Based upon the foregoing, Mark Leyse respectfully requests that the Commission deny Lifetime's petition in its entirety.

Dated: February 3, 2016

s/ *Todd C. Bank*
Todd C. Bank
119-40 Union Turnpike
Fourth Floor
Kew Gardens, New York 11415
(718) 520-7125

Counsel to Mark Leyse